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Notes and Comments

NOTES AND COMMENTS

Administrative Law: Constitutional Law: Delegation of legislative powers to administrative agency.—A Wisconsin statute provides for the appointment of a trade practice examiner who shall issue by order such "standards" as are "necessary or convenient" to eliminate unfair trade practices in various fields. Violation of a "standard" promulgated pursuant to the act is punishable by fine and imprisonment.[1] The Examiner issued "standards" for the barber trade regulating, among other things, licensing, hours and rates of pay, hours of opening and closing, and minimum prices to be charged for various barbering services.[2] The state of Wisconsin sought to have the defendant enjoined from operating his barber shop without a license and from violating the "trade practice standards" so issued by the Examiner. A dismissal of the complaint was affirmed on the ground that the promulgation of these "standards" was an unconstitutional exercise of a non-delegable legislative power. *State v. Neveau, 294 N. W. 796 (Wis. 1940).*

It is an established maxim of constitutional law that "the power conferred upon the legislature to make laws cannot be delegated by that department to any other body or authority."[3] This maxim is based on the theory of the separation of powers in the tri-partite governmental system and it has been pointed out that to consider it merely as an extension of the rule of agency *delegata potestas non potest delegari* would be erroneous.[4] Although most courts still pay lip service to the doctrine of the non-delegability of legislative powers, expansion of the operations of government has been accompanied by expansion of the limits of permissible delegation of legislative power to administrative bodies.[5]

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[1]Wis. Stat. (1939) § 100.205 (1) (a) (d).

[2]State v. Neaveu, 294 N. W. 796, 805 (Wis. 1940).

[3]Cooley, Constitutional Limitations (8th ed. 1927) § 224.

[4]Duff and Whiteside, *Delegata Potestas Non Potest Delegari,* (1929) 14 Cornell L. Q. 168; Note (1940) 25 Iowa L. Rev. 812.

[5]Practically all of the decisions adhere to the fiction that what Congress is delegating is the "power to fill in details" or to make "administrative regulations", but is not actually delegating legislative power. *See* United States v. Shreveport Grain and Elevator Company, 287 U. S. 77, 53 Sup. Ct. 42 (1932); Red "C" Oil Company v. North Carolina, 222 U. S. 380, 394, 32 Sup. Ct. 152 (1912); Radio Commission v. Nelson Brothers Company, 289 U. S. 266, 279, 53 Sup. Ct. 627 (1933). See also Panama Refining Company v. Ryan, *infra* note 12; Schechter v. United States, *infra* note 13. Logically, however, it seems clear that every administrative regulation whose violation is punishable by fine or imprisonment is the exercise of the legislative function. If rate fixing by a legislature is a "law", then why isn't rate fixing by a commission equally a "law"? This thesis is admirably developed in a learned opinion by Mr. Justice Rosenberry in *State* ex rel. *Wisconsin Inspection Bureau v. Whitman, 196 Wis. 472, 220 N. W. 929 (1928).* It is suggested therein that modification of the doctrines of separation and non-delegation of powers is needed. If we realize that overlapping of departmental functions is necessary and inevitable, and all the departments guard against over-concentration of power in any one, then a more symmetrical development of the law will be possible. By recognizing the power of administrative agencies to legislate (they do it anyway), there would be no loss of control over them. Checks on abuse of their power would still remain since (1) each agency must conform to the statute which grants its power, and (2) the "legislation" of the administrative body must be fair and equitable—not oppressive and unreasonable. See Dicey, *Development of Administrative Law in England,* (1915) 31 Law Quarterly Rev. 151.

While it is true that each state court must interpret its own constitution and that the United States Supreme Court will not decide whether a particular delegation infringes on the separation of powers within the state,[6] it is equally true that the state courts apply the federal decisions because state constitutions in the main are modeled after our federal Constitution.[7] In Wisconsin, development of the standards controlling delegability has paralleled the development in the Supreme Court.

From the early case of *The Brig Aurora*,[8] the federal decisions have gradually broadened the rules controlling the constitutionality of a delegation of power. First it was held that so long as Congress set the policy in the enacted statute, it would not be deemed an unconstitutional delegation of legislative power if enforcement was made to depend on an act of the President based on a finding of fact.[9] With the increasing complexity of government, the courts found that if the legislature furnished the general provisions, and clearly defined the limits of the statute, it might constitutionally allow an administrative officer to declare the specific rules and regulations.[10] In 1928 it was decided that, so long as the legislative act laid down an "intelligible principle" to which the administrator is directed to conform, there would be no forbidden delegation of legislative power.[11] Prior to *Panama Refining Co. v. Ryan*[12] and *A. L. A. Schechter Poultry Corp. v. United States*,[13] in no instance had the United States Supreme Court declared the delegation of power to issue rules and regulations void as an improper delegation of legislative power.[14] Professor Corwin had been led to declare:

> "Congress is enabled to delegate its powers whenever it is necessary and proper to do so in order to exercise them effectively."[15]

The two N.R.A. cases[16] declared that authorizing the President to approve and promulgate "codes of fair competition" constituted an unconstitutional delegation of authority; but those decisions cannot be said to have greatly limited the power of delegation. The Court expressly recognized that broad powers of administrative regulation may be delegated. It stated, however,

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[6]Highland Farms Dairy v. Agnew, 300 U. S. 608, 57 Sup. Ct. 549 (1937).

[7]Compare Art. IV, § 1 of the Wisconsin Constitution with U. S. CONST. Art. I, § 1. See *In re* Petition of State *ex rel.* Attorney General, 220 Wis. 25, 264 N. W. 633 (1936); State *ex rel.* Wisconsin Inspection Bureau v. Whitman, 196 Wis. 472, 220 N. W. 929 (1928).

[8]7 Cranch 382 (U. S. 1812).

[9]The Brig Aurora, 7 Cranch 382 (U. S. 1812); Field v. Clark, 143 U. S. 649, 12 Sup. Ct. 495 (1891).

[10]United States v. Grimaud, 220 U. S. 506, 31 Sup. Ct. 480 (1910) (Secretary of Agriculture to make rules and regulations concerning use and occupancy of forests); Union Bridge Co. v. United States, 204 U. S. 364, 27 Sup. Ct. 367 (1907) (Secretary of War empowered to order removal of unreasonable obstructions over waterways); Buttfield v. Stranahan, 192 U. S. 470, 24 Sup. Ct. 349 (1903) (Secretary of the Treasury may set up standards of purity and quality for imported tea).

[11]Hampton v. United States, 276 U. S. 394, 409, 48 Sup. Ct. 348 (1928).

[12]293 U. S. 388, 55 Sup. Ct. 241 (1935).

[13]295 U. S. 495, 55 Sup. Ct. 837 (1935).

[14]Duff and Whiteside, *supra* note 4; Notes (1923) 23 COL. L. REV. 66, (1933) 47 HARV. L. REV. 85, 95.

[15]CORWIN, TWILIGHT OF THE SUPREME COURT (1934) 145.

[16]*Supra* notes 12 and 13.

that there must be a legislative statement of policy sufficiently definite to prevent the exercise of pure discretion on the part of the administrative body.

> ". . . we look to the statute to see whether the Congress has declared a policy with respect to that subject; whether the Congress has set up a standard for the President's action; whether the Congress has required any finding by the President in the exercise of the authority to enact the prohibition."[17]

Just *how definite* the standards the legislature must set up are to be is not indicated. In the N.R.A. cases they were not sufficiently definite. Each subsequent statute, however, has had to meet this test: How definite are the policies and standards within which the administrative agency may make rules?[18]

Contrary to the development in the Supreme Court, early decisions are to be found in Wisconsin,[19] as in other states,[20] declaring acts of the legislature void for improperly delegating legislative power. In all other respects, Wisconsin development of the rules of delegability has been similar to that of the Supreme Court, the Wisconsin courts frequently citing the Supreme Court decisions with approval. At first, delegation by the state legislature was strictly confined to delegating the power to ascertain a fact which would start the operation of a statute;[21] then it was recognized that if the legislative act provided a general scheme an administrative body could be allowed to "provide the details";[22] and next it was held that all the legislature need do is lay down a standard to guide the administrative body.[23] After *Panama Refining Co. v. Ryan* and *Schechter v. United States,* a leading Wisconsin case approved those decisions and held the standard therein enunciated applicable to delegations of power by the state legislature.[24] In applying those rules the Wisconsin court has since held the following statutes to be definite standards, under which delegation of code making authority in two instances and delegation of authority to levy an assessment in a third were held constitutional:

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[17]Panama Refining Co. v. Ryan, 293 U. S. 388, 415, 55 Sup. Ct. 241 (1935).

[18]*See* United States v. Rock Royal Co-op., 307 U. S. 533, 574, 59 Sup. Ct. 993 (1939); Currin v. Wallace, 306 U. S. 1, 15, 59 Sup. Ct. 379 (1939). It has been indicated that perhaps delegation of power to legislate concerning foreign affairs may be made more freely than if the resultant rules are to apply to domestic matters. United States v. Curtiss-Wright, 299 U. S. 304, 57 Sup. Ct. 216 (1936).

[19]Dowling v. Lancashire, 92 Wis. 63, 65 N. W. 738 (1896); State *ex rel.* Adams v. Burdge, 95 Wis. 390, 70 N. W. 347 (1897).

[20]Maxwell v. State, 40 Md. 273 (1874); King v. Concordia Fire Ins. Co., 140 Mich. 258, 103 N. W. 616 (1905); Anderson v. Manchester Fire Assurance Co., 59 Minn. 182, 63 N. W. 241 (1894); Gilhooly v. City of Elizabeth, 66 N. J. L. 484, 49 Atl. 1106 (1901); People v. Klinck Packing Co., 214 N. Y. 121, 108 N. E. 278 (1915).

[21]Dowling v. Lancashire, 92 Wis. 63, 65 N. W. 738 (1896).

[22]State *ex rel.* Adams v. Burdge, 95 Wis. 390, 401, 70 N. W. 347 (1897); Minneapolis, St. Paul, etc., Ry. Co. v. Railroad Commission, 136 Wis. 146, 116 N. W. 905 (1908); State *ex rel.* Buell v. Frear, 146 Wis. 291, 131 N. W. 832 (1911). *But see* State *ex rel.* Carey v. Ballard, 158 Wis. 251, 148 N. W. 1090 (1914).

[23]State v. Lange Canning Co., 164 Wis. 228, 157 N. W. 777 (1916); State *ex rel.* Wisconsin Inspection Bureau v. Whitman, 196 Wis. 472, 220 N. W. 929 (1928).

[24]*In re* Petition of State *ex rel.* Attorney General, 220 Wis. 25, 264 N. W. 633 (1936).

(1) ". . . unfair methods of competition in business . . . are hereby prohibited."[25]
(2) ". . . [where] discriminatory, unfair, or unreasonable methods of competition exist, resulting in unjust or unreasonable prices."[26]
(3) ". . . sufficient to reimburse the state for expenses incurred."[27]

An appropriation made with the proviso ". . . the amount herein appropriated shall not become effective or available until released in whole or in part by the emergency board" was held unconstitutionally to delegate to the board the power of making an appropriation, because no standard for its action was set.[28] The statute in the main case, if construed as authorizing the promulgation of the "standards" in question, is declared unconstitutional on the ground that: "This provision of the code [price fixing] does not eliminate unfair trade practices or unfair methods of competition. It in effect declares that having two classes of service is detrimental to the general welfare. If that be true, that is a matter for the legislature. . . . As a whole the code is invalid as an unwarranted exercise of legislative power. . . ."[29] The Court here points out that the code is not related to unfair trade practices, but is a systematic scheme of regulating every phase of barbering. If this can be done at all, it must be by legislative enactment.

The Wisconsin decisions, the principal case being the most recent, indicate how the vague tests laid down in the *Panama Refining Co.* and *Schechter* cases are applied to varying situations. It would seem that a blanket authorization to an administrative body to make regulations approaching the scope of a comprehensive code would be an unconstitutional delegation of legislative power.

Jack L. Ratzkin

Bankruptcy: Future rent claims under the Railroad Reorganization Act.—The practical difficulties of proving damages for rejection of long-term railroad leases and the possible need for legislative revision of the Bankruptcy Act in this field are highlighted by the recent decision of the United States Supreme Court in *Palmer* et al. *v. Connecticut Railway & Lighting Co.*[1] The instant case is part of the litigation arising from the reorganization of the New York, New Haven and Hartford Railroad Company under Section 77 of the Bankruptcy Act.[2] The debtor in reorganization was lessee of certain street railway property owned by the claimant-lessor. The terms of the lease provided for an annual rental of over one million dollars, part of which was to be placed in a fund for the retirement of the lessor's bonds, and in addition, the lessor was given the right to

[25]*Supra,* note 23.
[26]State *ex rel.* Finnegan v. Lincoln Dairy Co., 221 Wis. 1, 265 N. W. 197 (1936).
[27]State *ex rel.* Attorney General v. Wisconsin Constructors, Inc., 222 Wis. 279, 268 N. W. 238 (1936).
[28]State *ex rel.* Zimmerman v. Dammann, 229 Wis. 570, 283 N. W. 52 (1938).
[29]State v. Neveau, 294 N. W. 796, 808 (Wis. 1940).

[1]61 Sup. Ct. 379; *rehearing denied,* 61 Sup. Ct. 609 (1941).
[2]11 U. S. C. A. § 205 (Supp. 1938).

repossess the property on default without prejudice to his right of action for rent or breach of the lease, but there was no covenant for liquidated damages. At the date of rejection by the debtor's trustee, said lease had an unexpired term of 969 years.

The lessor presented its claim for damages under Section 77 (b),[3] which provides that any person injured by the rejection of an unexpired lease is to be deemed a creditor with a provable claim to the extent of his "actual damage or injury determined in accordance with principles obtaining in equity proceedings."[4] On a previous certiorari,[5] the Supreme Court held that the lessor should be allowed damages to the extent of "the present value of the rent reserved less the present rental value of the remainder of the term," the amount to be determined by "evidence which satisfies the mind."[6] In so holding, the Court reversed the decision of the Circuit Court of Appeals,[7] which had affirmed the District Court[8] in holding that the lessor's claim was limited to the damages actually accruing until the date of the bar order, the rule generally followed in equity receiverships.[9] Mr. Justice Reed, writing for the court, rejected this limitation on three grounds: (1) Congress, by expressly providing limitations on future rent claims under other sections of the Bankruptcy Act,[10] inferentially indicated that there

[3]11 U. S. C. A. § 205 (b) (Supp. 1938):

"In case an executory contract or unexpired lease of property shall be rejected, or shall not have been adopted by a trustee appointed under this section, or shall have been rejected by a receiver in equity in a proceeding pending prior to the institution of a proceeding under this section, or shall be rejected by any plan, any person injured by such nonadoption or rejection shall for all purposes of this section be deemed a creditor of the debtor to the extent of the actual damage or injury determined in accordance with principles obtaining in equity proceedings."

The above section was provided in the Act of Aug. 27, 1935, 48 STAT. 911. Formerly, such claims were governed by the Act of March 3, 1933, 47 STAT. 1475, 1480:

Sec. 77 (b) ". . . The term 'creditor' shall . . . include . . . all holders of claims, interests, or securities of whatever character against the debtor or its property, including claims for future rent, whether or not such claims, interests, or securities would otherwise constitute provable claims under this Act."

It should be noted that claims for future rent in railroad reorganizations were made provable in the same Act which broadened the bankruptcy definition of creditor to include a claimant for future rent in ordinary liquidating bankruptcy. (See Section 74 of the Act, 47 STAT. 1467, 1468).

[4]*Ibid.*

[5]Connecticut Ry. & Lighting Co. v. Palmer, 305 U. S. 493, 59 Sup. Ct. 316 (1939). See discussions (1939) 6 CHI. L. REV. 695, (1939) 39 COL. L. REV. 302.

[6]Connecticut Ry. & Lighting Co. v. Palmer, *supra* note 5, at 505.

[7]*In re* New York, N. H. & H. R. Co., 95 F. (2d) 483 (C. C. A. 2d 1938).

[8]Matter of New York, N. H. & H. R.R.: Claim of Conn. Ry. & Lighting Co., U. S. Dist. Ct. Conn., Sept. 1, 1937.

[9]Pennsylvania Steel Co. v. New York City Ry., 198 Fed. 721, 741-742 (C. C. A. 2d 1912). See also Clark, Foley and Shaw, *Adoption and Rejection of Contracts and Leases by Receivers* (1933) 46 HARV. L. REV. 1111.

[10]Under Section 63 (a) of the Chandler Act, 11 U. S. C. A. § 103 (a) (7) (Supp. 1934) claims for future rent in liquidating bankruptcy are limited to one year's rent. Likewise, under Chapter XIII, Wage Earners' Plans, 11 U. S. C. A. § 1042 (Supp. 1938) a one year restriction applies. Under Section 202 of Chapter X, Corporate Reorganization, 11 U. S. C. A. § 602 (Supp. 1938) a three year limitation has been imposed. Claims for future rent are allowed without limitation under Chapter XI, Arrangements, 11 U. S. C. A. § 753 (Supp. 1938) and Chapter XII, Real Property Arrangements by Persons Other than Corporations, 11 U. S. C. A. § 858 (Supp. 1938).

should be no such limitation under Section 77 (b); (2) the use of the term "equity proceedings" was intended by Congress to be distinguished from "equity receiverships"; (3) "actual damages" cannot be construed as "accrued damages."

On remand to the District Court, the lessor undertook to prove damages according to the approved measure,[11] but restricted its claim to a forty year period, being advised that proof of rental value beyond such period was too uncertain to carry conviction. The District Court this time rejected the claim in its entirety, not only on the grounds that the evidence of past earnings was an inadequate measure of future earnings in this instance, but also because that portion of the term beyond reach of the proof offered (929 years) might have profits or losses which would upset the calculations for earlier years. The Circuit Court of Appeals reversed,[12] holding that the District Court had been unduly critical of claimant's evidence and that the claim should be allowed for the three year period from rejection to trial, and for eight years thereafter, using average earnings over the past fourteen years as a basis for computing rental value.[13]

In affirming the decision of the Circuit Court of Appeals, the Supreme Court contributed little of a practical nature to the problems here presented. The majority of the Court found that from the evidence submitted by the lessor, damages for the eleven year period could be ascertained with a "fair degree of certainty,"[14] and that this figure represented the lessor's damages for the entire term, on the theory that rent and rental value are presumed to be the same in the absence of a showing to the contrary.

Mr. Justice Frankfurter, dissenting, was of the opinion that the damages were inadequate, being merely those incurred over an eleven year period, where as it was the intention of Congress and the direction of the Court

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[11]Rental value from Dec. 18, 1935, the date of the rejection of the lease, to Dec. 18, 1975, was computed by the lessor as follows:

1936-1938 (Period after rejection and before trial):

During this period the actual earnings were used. The rental value was calculated to be the earning power of the sinking fund, plus adjustments of annual payments to the sinking fund required by the lease, plus actual operating profits.

1939-1975:

Lessor estimated the future rental value by using the average annual earnings, before federal taxes, over four prior base periods, each ending Dec. 31, 1938:

(a) The preceding year and a half when there was 100% bus operation.
(b) The preceding three years during which there was a transition from trolleys to buses.
(c) The preceding ten years.
(d) The preceding fourteen years.

Damages were computed by subtracting the present value of the annual rent reserved, discounted at 4%, for a forty year period from the rental value as calculated above and similarly discounted. No evidence of transportation experts or surveys as to the possibilities for development in the territory or of increased operating efficiency was offered in the instant case. See In re *New York, N. H. & H. R. Co., 30 F. Supp. 541 (D. Conn. 1939)*, where evidence of this nature, along with segregation and severance studies, were submitted to show that a 99 year lease of railroad property had no present rental value.

[12]109 F. (2d) 568 (C. C. A. 2d 1940).

[13]*Supra* note 11.

[14]Citing Sheldon v. Metro-Goldwyn Pictures Corp., 309 U. S. 390, 406-408, 60 Sup. Ct. 681, 687, 688 (1940).

on a previous certiorari[15] that the damages should contemplate the full term of the lease. He suggested that the case should be sent back and that such damages be ascertained on "a tough business basis."

The dissenting opinion of Mr. Justice Douglas (in which Mr. Justice Black concurred) likewise disapproved of the damages awarded, but offered a more concrete basis on which "adequate damages" might be found. A 999 year lease, according to Mr. Justice Douglas, should be regarded as "the equivalent of a fee interest," and the rejection of such lease is to be treated as a breach of contract to purchase land. Presumably, therefore, the damages should be the difference between the discounted value of the rent reserved for the remainder of the term and "the actual value of the property at the time of breach."

The conflicting decisions of the lower courts in the instant case and the wide divergence of opinion among the Justices of the Supreme Court seem to indicate that a concept of damages based on rental value at future dates is not feasible in the case of a long term railway lease where rental value must be dependent primarily upon earnings. Past earnings, even when accompanied by expert studies of the variable factors which affect income-producing capacity,[16] can be indicative of future earnings only for a limited period of time. Thus, an adequate forecast of earnings for a succession of years more than nine centuries distant is a distinct impossibility.

This concept, however, has been employed traditionally in determining future rent claims,[17] both under the Liquidating Act[18] and under the Corporate Reorganization Act,[19] once such claims were made provable by reason of the 1934 amendments to the Bankruptcy Act.[20] Before that time, disallowance was the usual fate of future rent claims[21] unless the lease was terminated and the claim came into existence prior to the proceeding,[22] or the lease contained a covenant for damages in case of breach,[23] or where recovery was permitted by some theory of local law,[24] such as anticipatory breach.

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[15]Connecticut Ry. & Lighting Co. v. Palmer, *supra* note 5.

[16]Suggested by Mr. Justice Douglas are studies of the territory served, population trends, competitive conditions and the records of companies in comparable territory, Palmer v. Connecticut Ry. & Lighting Co., *supra* note 1. See also, Meck and Maston, *Railroad Leases and Reorganization* (1940) 49 YALE L. J. 626.

[17]Kuehner v. Irving Trust Co., 299 U. S. 445, 57 Sup. Ct. 298 (1937); City Bank Farmers' Trust Co. v. Irving Trust Co., 299 U. S. 433, 57 Sup. Ct. 292 (1937).

[18]Section 63(a) of the Chandler Act, 48 STAT. 923, 11 U. S. C. A. § 103 (a) 7 (1934).

[19]Section 202 of Chapter X of the Chandler Act, 52 STAT. 893, 11 U. S. C. A. § 602 (Supp. 1938).

[20]Claims for future rent in liquidating bankruptcy were specifically made provable by Section 63 (a), *supra* note 18, and in corporate reorganization by Section 77B, 48 STAT. 912, 11 U. S. C. A. § 207(b) (1934). The latter section was superseded by Section 202 of Chapter X of the Chandler Act.

[21]Manhattan Properties v. Irving Trust Co., 291 U. S. 320, 54 Sup. Ct. 385 (1934); Kothe v. Taylor, 280 U. S. 224, 50 Sup. Ct. 142 (1930).

[22]Gardiner v. Butler & Co., 245 U. S. 603, 38 Sup. Ct. 214 (1918); Filene's Sons Co. v. Weed, 245 U. S. 597, 38 Sup. Ct. 211 (1918).

[23]Irving Trust Co. v. Perry, 293 U. S. 307, 55 Sup. Ct. 150 (1934); Manhattan Properties v. Irving Trust Co., *supra* note 21.

[24]*In re* Mullins Clothing Co., 238 Fed. 58 (C. C. A. 2d 1916), *cert. denied*, 243 U. S. 635, 37 Sup. Ct. 399 (1917); *cf.* Central Trust Co. v. Chicago Auditorium, 240 U. S.

But in liquidation and in corporate reorganization, claims are limited to one and three years rent respectively.[25] To such limited periods the traditional concept of damages is readily applicable. Regardless of Congressional intent in excluding a similar limitation from Section 77,[26] it seems equally clear that the long term character of many existing railroad leases[27] renders adequate damages unsusceptible of proof if this concept is adopted in dealing with such leases.

Unfortunately, the majority of the Court have adhered to tradition and allowed damages on a year by year basis, employing the obvious ficition that rent and rental value are equal in order to rationalize their position as to that part of the term beyond reach of the proof. As a result, the recovery does not reflect "the damages that sprang into existence from the disaffirmance of the remaining 969-year term,"[28] but rather the damage "from the disaffirmance of a supposed 11-year lease."[29] Damages, then, must depend upon the extent to which past earnings may be projected into the future, a period which may vary considerably according to the circumstances of the particular case.

The approach of Mr. Justice Douglas envisages a more practical solution, and one whereby the "actual damage" presently suffered may be determined. There is, of course, the obvious difficulty of showing the "actual value of the property at the time of breach." In the normal situation involving a breach of contract for the purchase of land, *actual value* is the equivalent of *market value*.[30] By reason of the large capital expenditure involved and because the leased property may have a value peculiar only to the lessee due to its geographical situation,[31] it would be difficult to say that such property had a definite *market value*. On the other hand, the I.C.C. has frequently evaluated railroad property for the purpose of capitalizing reorganized lines under Section 77 (e),[32] and there is no reason to believe

581, 36 Sup. Ct. 412 (1916). For a general discussion of future rent claims other than under the Railroad Reorganization Act, see Note *Landlords' Claims in Bankruptcy and Reorganization* (1940) 26 VA. L. REV. 1052; Clark, Foley and Shaw, *Adoption and Rejection of Contracts and Leases by Receivers* (1933) 46 HARV. L. REV. 1111.

[25]*Supra* note 10. As to possible reasons why Congress set a different limitation in the reorganization Act than in the liquidating Act, see Note *Landlords' Claims in Bankruptcy and Reorganization, supra,* note 24.

[26]For possible reasons for such exclusion, see Note (1939) 6 CHI. L. REV. 695, 698 *et seq.* See also, Friendly, *Amendment of the Railroad Reorganization Act* (1936) 36 COL. L. REV. 27.

[27]See Meck and Maston, *Railroad Leases And Reorganization* (1940) 49 YALE L. J. 626, 633.

[28]Dissenting opinion of Mr. Justice Frankfurter, Palmer v. Connecticut Ry. & Lighting Co., *supra* note 1.

[29]*Ibid.*

[30]3 SEDGWICK, DAMAGES (3rd ed. 1912) § 1023 *et seq.;* 1 SUTHERLAND, DAMAGES (4th ed. 1916) § 52.

[31]See In re *New York, N. H. & H. R. Co., 30 F. Supp. 541 (D. Conn. 1939)* where a New Haven lease of the Old Colony R. R. was held valuable, if at all, only as part of the New Haven system. On the other hand, lessor in the present instance is a bus company operating as a feeder system to the New Haven, and clearly might have value as an independent entity.

[32]See Note, *Valuation and Capitalization of Railroads in Reorganization* (1941) 54

that a *fair value* of the leased property might not be found. Moreover, *actual value* might be construed solely as the capitalized value of earnings[33] based on segregation and severence studies of the property over a period of years.[34]

A third approach, possibly contemplated by Mr. Justice Frankfurter when he mentioned damages ascertained "on a tough business basis," would be to fix the lessor's damages at the difference between the value of the leased property with and without the lease. This approach inferentially stresses *market value* even more than does that of Mr. Justice Douglas, and for this reason could be said to lack practicality.

If the majority opinion in the instant case becomes the settled rule of the Court, it would seem that Congress should impose a limitation upon lessors' claims. Such a limitation, though arbitrary, would insure identical treatment to all lessors, and their damages would no longer depend upon the extent to which they could project past earnings into the future. A limitation of this nature would alleviate the injustice of astronomical claims in cases where the leased property has no present rental value.[35]

In the absence of Congressional action, the view entertained by Mr. Justice Douglas appears to be the only method by which the damages awarded may theoretically contemplate the entire term of the lease.

Draftsmen of future railroad leases might well circumvent the hazards involved in proving the lessor's damages by inserting in the lease an *ipso facto*[36] clause and a clause specifying an agreed sum as *liquidated damages*.[37] Thus the recovery would be for breach of a covenant other than to pay rent, but the compensation would be in lieu thereof.[38] As Congress has not seen fit to place a limitation upon future rent claims under Section 77, there is no reason to believe that this device would be regarded as a scheme to exploit the debtor at the expense of the other creditors, and if the agreed sum is fair and reasonable, it should be an adequate measure of the damages actually suffered.

Frederick L. Raker

Contracts: Equity: Employee covenants not to compete after termination of the employment.— The inclusion in employment contracts of covenants by the employee not to engage in a competing business subsequent to

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HARV. L. REV. 655; Spaeth and Windle, *Valuation of Railroads under Sec. 77 of the Bankruptcy Act* (1938) 32 ILL. L. REV. 517.

[33]*Cf.* Case v. Los Angeles Lumber Products Co., 308 U. S. 106, 60 Sup. Ct. 1 (1939), *rehearing denied* 308 U. S. 637, 60 Sup. Ct. 258 (1939).

[34]For a discussion of such studies, see Meck and Maston, *Railroad Leases And Reorganization* (1940) 49 YALE L. J. 626.

[35]See *In re* New York, N. H. & H. R. Co., *supra* note 31.

[36]See Irving Trust Co. v. Perry, *supra* note 23; Filene's Sons Co. v. Weed, *supra* note 22.

[37]*Ibid.*

[38]*Cf. In re* Radio-Keith Orpheum Corp. (S. D. N. Y. 1935) (unreported) (where such damages were allowed in corporate reorganization, despite the three year limitation on future rent claims).

the termination of the master-servant relationship[1] is no modern device, for at the turn of the fifteenth century they were already a fruitful source of litigation.[2] The early common law unequivocally declared such negative covenants to be absolute nullities.[3] But the introduction into England of the doctrine of *laissez-faire,* along with other factors, notably the Industrial Revolution,[4] turned the scales of eighteenth century public policy in favor of upholding restraints when voluntarily accepted by the employee.[5]

It was the contention of the *laissez-faire* and utilitarian schools that the universal solvent for all social and economic problems was *absolute* freedom of contract, embracing all party-to-party relationships, including that of employer-employee.[6] Modern courts and legislatures, however, aware of the social injuries flowing from this doctrine, have recognized the necessity of limiting freedom of contract between master and servant.[7] Out of this

[1]Restrictive covenants normally fall into two broad categories: (1) those stipulating that the employee will not accept employment with others *during* the term of the employment and (2) those providing that the servant will not enter a competing endeavor *after* the termination of the employment. These classes are not mutually exclusive, however, since it is quite possible to draw a restrictive agreement effective both during and after the period of hire.

It is frequently stated that the employee affected by category "1" always possesses unusual or "unique" qualities whereas this is never true of an employee who agrees to a covenant falling within division "2". Carpenter, *The Validity of Contracts Not To Compete* (1928) 76 U. OF PA. L. REV. 244, 266 and cases cited therein. It is also maintained that the granting or withholding of an injunction in the instance of covenant "1" depends entirely on whether the defendant is of unique caliber. Carpenter, *id.,* and cases cited therein. These generalizations do not have universal validity, however, and it is neither improper nor rare for a court to enjoin a defendant of ordinary capabilities although the contract be of type "1". Columbia College v. Tunberg, 64 Wash. 19, 116 Pac. 280 (1911).

Uniqueness is not the *sine qua non* of relief in category "1" nor should it be completely disregarded as a criterion of relief in class "2". It is merely one of many factors to be considered in measuring the degree of competition in either case or in a combination of agreements "1" and "2". An injunction (properly limited in scope) will and should be issued whether the contract be of type "1" or "2" or in combination if the plaintiff can prove: (a) unfair competition by the defendant and (b) inadequacy of legal remedy (usually because damages are unascertainable and speculative) resulting from a breach of the negative covenant. *Cf.* Stevens, *Involuntary Servitude By Injunction* (1921) 6 CORNELL L. Q. 235, 266; see also Note (1936) 22 CORNELL L. Q. 246.

[2]Carpenter, *The Validity of Contracts Not to Compete, supra* note 1.

[3]Anonymous, Y. B. 2 Hen. v. pl. 26 (1415); Note (1928) 28 COL. L. REV. 81.

[4]With the Industrial Revolution, the scarcity of human labor, originally caused by the Great Plague, decreased, thereby lessening the importance of workingmen to the state. Further, modern modes of migration were introduced, and new trades were more easily learned so that the possibility that the enforcement of a restrictive covenant would cause the employee to become a charge on the state was considerably reduced.

[5]Mitchell v. Reynolds, 1 P. Wms. 181 (1711) was the first decision to so hold. See discussion in Gare, *Covenants in Restraint of Trade* (1935), London.

[6]See opinion of Sir George Jessel in Printing Co. v. Sampson, 19 Eq. Cas. L. R. 462, 465 (1865): "If there is one thing more than any other which public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that contracts when entered into freely and voluntarily shall be held good and shall be enforced by courts of justice." For brief discussion of the *laissez-faire* and utilitarian schools and the thinkings of Adam Smith, Ricardo, Bentham, and John Stuart Mill. *cf.* Williston, *Freedom of Contract* (1921) 6 CORNELL L. Q. 365.

[7]The modern approach is well stated in Children's Hospital v. Adkins, 261 U. S. 525, 43 Sup. Ct. 394 (1921). "Our statutes against monopoly and against combinations

new approach has emerged the proposition which has since been the foundation of both American and English decisions: Those restraints *reasonably* necessary for the protection of the employer's business will be upheld.[8] Naturally, the core of the problem is the word *reasonable,* the determinants being time, place, and circumstance.[9]

New England Tree Expert Co. Inc. v. Russell, 28 N. E. (2d) 997 (Mass. 1940) presents the issues in modern setting. Plaintiff corporation carries on a general arbori-cultural business, operating in Connecticut, Massachusetts, Rhode Island, Vermont, New Hampshire, and Maine. Defendant was employed in May, 1937, as a salesman, apparently under a hiring at will, since the court mentions no definite period of employment. Furthermore, the defendant's salary was variable. On July 31, 1937, the defendant, along with all the members of the sales force, was requested, under pain of dismissal, to execute a contract providing that: "If the employment of the . . . [defendant] shall be terminated for any cause whatsoever, he will not, for a period of three years from the date of such termination, engage in any of the New England states in the same or any similar business as that carried on by . . . [the plaintiff], either for himself, or as an agent, or as a servant. . . ." In October, 1938, the defendant voluntarily quit his employment and entered business for himself, in competition with the plaintiff corporation. The defendant operated mainly within that area which had been assigned to him while he was associated with the company, *i.e.,* the southeastern section of Massachusetts, and performed work for several customers from whom he had solicited tree surgery while engaged by the plaintiff. Plaintiff brought suit in equity to restrain the defendant's breach of the restrictive covenant. *Held:* That the defendant be enjoined from engaging in any competing business until October, 1941, within all of Rhode Island, part of Connecticut and Massachusetts.

It is submitted that the Massachusetts court might logically have arrived at an opposite conclusion on one or all of three grounds: unreasonableness of restraint, lack of consideration, and economic duress.

The numerical preponderance of American decisions, in the absence of statute,[10] allies itself with the principal decision in upholding the reasonableness of a restriction which precludes the servant of ordinary ability from engaging in a competing endeavor either during or after the period of em-

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in restraint of trade bear witness to the underlying assumption of our law that liberty can be pushed to a point at which liberty is destroyed." CARDOZO, THE PARADOXES OF LEGAL SCIENCE (1928), 120. "Observation of result has proved that unlimited freedom of contract . . . does not necessarily lead to public or individual welfare. . . ." Williston, *Freedom of Contract* (1921) 6 CORNELL L. Q. 365. See Pope M'fg. Co. v. Gormully, 144 U. S. 224, 234, 12 Sup. Ct. 632 (1891).

[8]Grand Union Tea Co. v. Walker, 208 Ind. 245, 195 N. E. 277, 98 A. L. R. 958, 963 (1935), wherein recent cases are cited. Note (1917) 2 CORNELL L. Q. 331.

[9]Recent cases are cited in the Annotation to Samuel Stores v. Abrams, 94 Conn. 248, 108 Atl. 54, 9 A. L. R. 1450, 1469-1472 (1919).

[10]In a number of jurisdictions all contracts in restraint of trade are invalid except those ancillary to the sale of a business or the dissolution of a partnership: CAL. CIV. CODE §§ 1673-1675; MICH. COMPILED LAWS (1929) §§ 1667, 16672; N. D. COMP. L. (1913) §§ 5928-30; OKLA. STAT. ANN. (1931) title 15 §§ 217-218; S. D. CIV. CODE (1929) §§ 898-900.

ployment, provided that the time and area are not greater than the circumstances warrant.[11] These holdings, however, seem to be the result of a failure by the courts to perceive that "competition" is not an absolute concept, but a variable one. For competition connotes an interference with either (a) actual and potential trade *or* (b) actual trade. An employee who is capable of attracting the patronage of the general public by virtue of his exceptional talent can, by the same token, threaten his employer with competition "a", for the "public" comprises not only those who are present patrons, but also those individuals who eventually may so become.

In contradistinction is the replaceable employee who is capable only of gaining a hold (*via* personal contact and solicitation) on select and definite customers, clearly identifiable. Having no grip on the public, his association with a competing organization will result merely in competition "b", his attraction of potential trade being *at that point* nil. Competition "b" thus clearly illustrates a refinement of what the courts refer to generically as "competition".

That an intelligent solution of this vital, modern social problem cannot be reached by upholding a negative covenant which in blanket-like fashion restrains the ordinary servant from "competition" (albeit for a reasonable time and within a reasonably circumscribed area) is recognized by a minority of American courts and the highest judicial authority in England.[12]

Illustrating the problem is the hypothetical case of two employees—*A* and *B*. *A* is a famous ballerina; *B* is a salesman, not unlike our present defendant, who is engaged to solicit and build up a route and a clientele over which *B* soon gains a hold through personal contact. Both *A* and *B* have agreed with their respective employers not to compete either during or after the period of employment (or both).[13] A breach of the covenant by either individual would result in inadequacy of legal remedy since the damages would be conjectural. But a violation by *A* of her agreement would involve the alienation from her employer of the entire theatre-going public attracted by *A*'s renown, a group comprising not only those who have attended but also those who *would* attend were the attraction to remain. *A*'s unusual capacities so aggravate her competition as to make it a case wherein her employment (by another) *per se* causes irreparable damage. To afford her employer the protection to which he is equitably entitled,

[11]Erikson v. Hawley, 56 App. D. C. 268, 12 F. (2d) 491 (1926); Hopper v. Western Tablet and Stationary Corp., 66 F. (2d) 172 (C. C. A. 6th 1933); Briggs Co. v. Mason, 217 Ky. 269, 289 S. W. 295 (1926); Ward Baking Co. v. Tolley, 222 App. Div. 653, 225 N. Y. Supp. 75, *aff'd. w. o. op.*, 248 N. Y. 603, 162 N. E. 542 (1928); *Cf.* 5 WILLISTON ON CONTRACTS (Rev. ed., Williston and Thompson 1937) §§ 1643 and cases cited.

[12]Samuel Stores v. Abrams, *supra* note 9; Super-Maid Cook-Ware v. Hamil, 50 F. (2d) 830 (C. C. A. 5th 1931); May v. Young, 125 Conn. 1, 2 A. (2d) 385 (1938); Victor Chemical Works v. Iliff, 299 Ill. 532, 132 N. E. 806 (1921); Clark Paper and M'fg. Co. v. Stenacher, 236 N. Y. 312, 140 N. E. 708 (1923); Burroughs Adding Machine Co. v. Chollar (Tex. Civ. App.), 79 S. W. (2d) 344 (1935); Milwaukee Linen Supply Co. v. Ring, 210 Wis. 467, 246 N. W. 567 (1933); Mason v. Provident Clothing and Supply Co. (1913) A. C. 724; Morris v. Saxelby (1916) 1 A. C. 688; Hepworth M'fgr. Co. Ltd. v. Wernham Ryott (1920) Ch. 1; Attwood v. Lamont (1920) 3 K. B. 371; Gilford Motor Co. Ltd. v. Horsie (1933) Ch. 935.

[13]See *supra* note 1.

a *complete* prohibition of *A*'s entering the service of a competitor is necessary and therefore reasonable.

B's breach, however, presents a different picture. *B*, though he is in a position to injure the good will of his master's business because of his personal acquaintance with the trade, is limited to this one phase of competition, *i.e.*, pirating of actual customers (the element of trade secrets being not present).[14] Being substitutive, and readily so, his invasion of the field does not *in itself* impair the potential patronage of his former employer.

Thus the range of *B*'s competition does not approach that of *A*'s; and logically, a negative covenant applying to *A* cannot embody the same terms in *B*'s instance and still be held reasonable. *A*'s employer is entitled to a *total* restraint on her competition (the factors of time and area being acceptable); *B*'s employer is deserving only of a covenant dealing with the prevention of the *specific* evil of *B*'s diversion of present patronage in his former area, for *B*'s unfair competition does not and cannot extend any further. It is true that this result is achieved by the general restraint imposed by the Massachusetts court. But at what price? The cost is to deprive the defendant of his ability to earn a livelihood for a period of three years in practically all of New England.[15] Any restraint, *e.g.*, of the principal case, not only grants the employer far more ample security than he merits but also unduly fetters the employee and is, therefore, unreasonable, unjustifiable and void.[16] Yet the courts fail to discriminate.[17]

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[14] 5 WILLISTON ON CONTRACTS (Rev. ed. Williston & Thompson 1937) § 1446 and cases cited therein.

[15] *See* Love v. Miami Laundry Co., 118 Fla. 137, 142, 160 So. 32 (1935): "That courts are reluctant to uphold contracts whereby an individual restricts his right to earn a living . . . is well established." Citing Michigan, South Carolina, New Jersey, and Rhode Island cases.

Samuel Stores v. Abrams, *supra* note 9; Union Strawboard v. Bonfield, 193 Ill. 421, 61 N. E. 1038 (1901). RESTATEMENT, CONTRACTS (1932) § 513: "A bargain is in restraint of trade when its performance would limit competition in any business *or restrict a promisor in the exercise of a gainful occupation.*" (Italics added). See clause (b) and illustration 6 to clause (b) of § 515.

[16] RESTATEMENT, CONTRACTS (1932) § 515: "A restraint of trade is unreasonable, in the absence of statutory authorization or dominant social or economic justification if it (a) is greater than is required for the protection of the person for whose benefit the restraint is imposed. . . ."

The *Samuel Stores* case, cited *supra* note 9, was decided on facts quite similar to those of the principal case. The defendant was a clothing store manager who agreed not to compete, after the cessation of the employment, for five years, within any city wherein the plaintiff maintained a business. Defendant then quit and began soliciting plaintiff's trade. The court held the restriction invalid commenting that defendant's injury to the plaintiff consisted only of trade diversion. Therefore, "the reasonable and fair protection of the plaintiff's business does not require such extended restrictions. . . . To enforce the sweeping terms of this restrictions would be a useless, unnecessary, and undue curtailment of the defendant's liberty of trading." The entire covenant was therefore void and the plaintiff must suffer the consequences because, ". . . like the dog in the fable, they grasp at too much, and so lose all." At p. 255, citing Herresford v. Boutineau, 17 R. I. 7, 19 Atl. 713 (1890).

The court went on to say: "A restrictive agreement providing that the defendant while connected with a competing business should not solicit trade from persons who were customers of the plaintiff at the branch store where the defendant was employed during his employment, might fairly be claimed to be such a restriction as is reasonably necessary for the fair protection of the plaintiff's business."

But cf. Becker College v. Gross, 281 Mass. 355, 183 N. E. 765 (1933) enforcing a

That negative covenants of the variety involved in the principal case are supported by consideration is a foregone conclusion with most courts, both in America and England.[18] Many, like the Massachusetts tribunal, do not even discuss the problem.[19] Althought executory contracts at will are unenforceable,[20] it is maintained that the promise of employment,[21] or the

negative covenant designed merely to prevent competition and not to prevent injury to which the employment exposed the employer.

Dean Carpenter in *Validity of Contracts Not to Compete, supra* note 1, page 256 says: ". . . employees should be able to legally bind themselves not to use the personal knowledge of trade secrets and the personal influence with customers. . . . There is no basis, however, for holding that the contract not to compete should be treated as valid when the restraint extends beyond the use of such knowledge and influences. . . . The employer's business may require restraints which he is not entitled to impose."

Thus the House of Lords in *Morris v. Saxelby, supra* note 12, in which the court expressed the view that in cases such as these, the employer is entitled to restrain employees from (1) exposure of trade secrets and (2) diversion of customers. "But freedom from all competition *per se* apart from both these things however lucrative it may be he is not entitled to be protected against. He must be prepared to encounter that even at the hands of a former employee." p. 703.

Viscount Haldane in *Mason v. Provident Clothing and Supply Co., supra* note 12, was of the view that, at page 741, "A very reasonable restriction of a canvasser in such circumstances as are here disclosed might no doubt have been that he should not canvass his old customers. . . . But to extend it from that to the wide range I have set forth . . . is not a protection for the employer but a means of coercing and punishing the workman."

Whether this particular division is subdivisible so that "blue-pencilling" can save the reasonable part of a restriction which in its entirety is unreasonable is beyond the present discussion. It would appear that in a majority of those jurisdictions which permit severability, the covenant in the principal case would not be eligible for divisibility because the clause itself does not admit of separation. Hence the entire restriction must fail. RESTATEMENT, CONTRACTS (1932) § 518. This, by far, is the better view. Massachusetts, leaning heavily in favor of upholding negative covenants, applies the doctrine of severability despite the absence of provision for "blue-pencilling" in the clause itself. Edgecomb v. Edmonston, 257 Mass. 12, 153 N. E. 99 (1926). For criticism of this method see Notes (1935) 22 CORNELL L. Q. 246 (discussing Warner Brothers Pictures Inc. v. Nelson [1937] 1 K. B. 209); (1935) 15 B. U. L REV. 834; (1932) 17 MINN L. REV. 86; (1926) 40 HARV. L. REV. 326.

[17]Proctor v. Hansel, 205 Ia. 542, 218 N. W. 255 (1928); Menter v. Brock, 147 Minn. 407, 180 N. W. 553 (1920); Sternberg v. O'Brien, 48 N. J. Eq. 370, 22 Atl. 348 (1891); McCall Co. v. Wright, 198 N. Y. 143, 91 N. E. 516 (1910); Scott v. Gillis,, 197 N. C. 223, 148 S. E. 315 (1929); Thompson Optical Institute v. Thompson, 119 Or. 252, 237 Pac. 265 (1925); Jewell Tea Co. v. Grisson, 279 N. W. 544 (S. D. 1939). *But cf.* Ureka Laundry Co. v. Long, 146 Wis. 205, 131 N. W. 412 (1911); Duerling v. City Baking Co., 155 Md. 280, 141 Atl. 542 (1928).

[18]Clark Paper and Mfgr. Co. v. Stenacher, *supra* note 12; Red Star Yeast and Products Co. v. Hagne, 25 Ohio App. 100, 157 N. E. 393 (1927). Hitchcock v. Coker (1837) 6 A. & E. 438, altered the former view in England which had required that the consideration be not merely valuable but adequate so that consideration was required even though the contract was under seal (Mitchell v. Reynold, *supra* note 5).

[19]Duerling v. City Baking Co., *supra* note 15; International Mut. Fire Ins. Co. v. Carrington, 241 Ill. App. 208 (1926); Thomas N. Briggs v. Long, 146 Wis. 205, 131 N. E. 412 (1911).

[20]1 WILLISTON ON CONTRACTS (Rev. ed. Williston & Thompson 1936) § 104, pp. 351-2. There is, of course, considerable merit in the position that consideration for his promise can be found in the learning of a trade by the employee. There is no suggestion in the decision, however, that such was the case with the present defendant.

[21]Sherman v. Pfefferkorn, 241 Mass. 468, 135 N. E. 558 (1922): Bettinger v. North Ft. Worth Ice Co. (Tex. Civ. App.), 278 S. W. 466 (1925); Gravely v. Barnard, L. R. 18 Eq. 518 (1874).

provision for the giving of notice,[22] or the mere continuance of the employ[23] is sufficient consideration. With this position the civil law and a few American jurisdictions take issue,[24] and properly so. Certainly no extra compensation is given for the servant's promise.[25] The civil law rightly views part of the good will as belonging to the solicitor-employee of which he should not be divested without substantial consideration.[26] And as for the granting of employment as consideration, is it to be contended that if courts were to outlaw such covenants entirely the defendant would find it more difficult to secure a position?[27] The plaintiff could ill afford to hire fewer servants for the performance of the same quantum of work. These restrictive covenants have all the earmarks of executory unilateral contracts which are unenforceable by either party.[28] Furthermore, the employer can end the contract at will and bring the disabling clause into play at any time he sees fit—a potential means of coercion, the enforcement of which no court of equity, being discretionary, should undertake.[29] Certainly in determining the reasonableness of the covenant the court should enforce or invalidate the agreement as made and not as it subsequently develops.[30]

Granting, however, that the court will not inquire into the adequacy of the consideration, the covenant in the instant case appears to have been included in a contract made several months after the contract of hire—if any—was negotiated. This indicates that whatever consideration can be

[22]McCall Co. v. Wright, *supra* note 14; Jennings v. Shepherd Laundries Co., (Tex. Civ. App.), 284 S. W. 693 (1926).

[23]Cali v. Nat'l Linen Service Corp., 38 F. (2d) 35 (C. C. A. 5th 1930); Granger v. Craven, 159 Minn. 296, 199 N. W. 10 (1924); Elbe File and Binder Co. v. Fine, 137 Misc. 255, 242 N. Y. Supp. 632 (Sup. Ct. 1930).

[24]Super-Maid Cook-Ware Corp. v. Hamil, *supra* note 18; Love v. Miami Laundry Co., *supra* note 18; Victor Chemical Works v. Illiff, *supra* note 12; Shreveport Laundries Inc. v. Teagle, 139 So. 563 (La. 1932); Cloverdale Dairy Products v. Grace, 180 La. 694, 157 So. 393 (1934); Iron City Laundry v. Layton, 55 Pa. Sup. Ct. 93 (1914); May v. Lee, 28 S. W. (2d) 202 (Tex. Civ. App. 1934).

[25]"The employer has only agreed to pay the employee that which he may earn by his labor . . . hardly enough consideration to make it a binding legal contract." Love v. Miami Laundry Co., *supra* note 18 at p. 148.

[26]Shreveport Laundries Inc. v. Teagle, *supra* note 24 at p. 566; Seward v. Shields, 9 Pa. Dist. R. 583 at pp. 583-4.

[27]"Appellant's promise of employment . . . would not be a sufficient consideration for the promise of the respondent." Schneller v. Hayes, *supra* note 29 at p. 119.

[28]May v. Lee and Gaff v. Saxon, *supra* note 29.

[29]"The plaintiffs could have discharged the defendant after one hour's service, and he would have been by its terms, if the plaintiff's construction is correct, prevented from working at his business as a window cleaner for the term of one year. . . . The provisions of the contract are too inequitable to justify a court of equity to enforce its provisions." Gilbert v. Wilmer, 102 Misc. 388, 168 N. Y. Supp. 1043 (Sup. Ct. 1918).

"[Since the plaintiff could terminate the contract on reasonable notice] It would be very inequitable to enforce this contract *even if the process aforesaid were secret.*" (Italics added). Victor Chemical Works v. Iliff, *supra* note 12, at 550.

[30]"Equity looks at the terms of the contract itself not at its sequences or results. . .", dissent, Nat'l Gum and Mica Co. v. Braendly, 27 App. Div. 219, 233, 51 N. Y. Supp. 93 (1st Dep't 1898). "Whether the contract rests upon a valuable consideration must be determined by the conditions as they exist when it is made, not as they may be at some subsequent time," 1 ELLIOT ON CONTRACTS (1913) 338. Rannie v. Irvine (1844) 7 Man. & G. 969, 976.

gleaned from the contract of employment had already been given (under the original contract of employment) for services rendered.[31] Moreover, the separateness of the two engagements suggests that the covenant was ancillary to no immediate major contract and, consequently, repugnant to a well established policy of the law.[32]

The third possible ground for reversal is closely bound to the inquiries of both reasonableness and lack of consideration. If the giving of employment is recognized as consideration, can the threat of dismissal be upheld as such in the subsequent negative agreement or be considered fair conduct in obtaining a promise that is required to be reasonable and equitable not only in result but in exaction?[33] Such strategy on the part of the plaintiff borders closely on the legal concept of "economic duress", a doctrine which has found increasing application[34] in the field of master-servant (*e.g.*, the invalidation of "yellow-dog" contracts and the substitution of workmen's compensation for the employee's contractual assumption of the risk of injury). Although the plaintiff corporation's dealings with the defendant do not fall clearly within any of the categories of duress presently recognized at law, it appears that a court of equity, as that before which the principal case was heard, should not overlook both the "unclean hands" and "unconscionable bargain"[35] aspects of the present plaintiff's tactics. "Means lawful in themselves must not be oppressively used."[36]

Louis Pollack

Corporations: Methods of valuation of goodwill of business associations.—The problem of determining the value of the goodwill of a business enterprise has arisen in several different types of cases. Among them are proceedings involving the valuation of goodwill (1) for purposes of trans-

[31]WILLISTON ON CONTRACTS (Student ed. 1936) § 142: "A promise made, after a sale or a contract of service to pay a larger price than had been originally agreed upon [is] invalid; and generally the doctrine that past consideration is no consideration is well recognized and universally enforced."

[32]". . . no conventional restraint of trade can be enforced unless the covenant embodying it is merely ancillary to the main purpose of a lawful contract. . . .", Taft, J., United States v. Addyston Pipe Co., 85 Fed. 271 (C. C. A. 6th 1897), *aff'd* 175 U. S. 211, 20 Sup. Ct. 96 (1898).

[33]See *supra* note 29. "Another instance of duress of property would seem to arise where a seller refuses delivery unless the buyer consents to pay a price greater than that agreed upon." Cases cited, 5 WILLISTON ON CONTRACTS (Rev. ed. Williston and Thompson 1937) § 1617.

[34]Llewellyn, *What Price Contract?* (1931) 40 YALE L. J. 704, note 49. There is, furthermore, an element of monopoly in these cases which deserves the attention of the court: "Suppose, however, that a country-wide business should exact such restrictive covenants of all employees. [Here] the tendency toward monopoly might become decisive. . . . *Such wholesale restrictions would point to a monopoly purpose.*" (Italics added). Kales, *Contracts to Refrain from Doing Business or from Entering or Carrying on an Occupation* (1917) 31 HARV. L. REV. 193; 5 WILLISTON ON CONTRACTS (Rev. ed. Williston and Thompson 1937) § 1652.

[35]See *supra* note 28; see Love v. Miami Laundry Co., *supra* note 17: "[This restrictive covenant] is so inequitable, oppressive, and unfair, that a court of conscience should withhold its aid toward its enforcement."

[36]5 WILLISTON ON CONTRACTS (Rev. ed. Williston and Thompson 1937) § 1607.

fer and income taxes, (2) to determine the value of shares of stock in an action for fraud or by stockholders dissenting from corporate acts such as consolidation, and (3) in an action for an accounting by one partner against the remaining partners. It is submitted, however, that the nature of the proceeding has not dictated the method of valuation adopted in a particular case. Generally, the courts have dealt with the problem in a broad way and have made few attempts to compel fine distinctions. Certain methods, nevertheless, have been worked out to afford a mathematical computation as a basis for ascertaining goodwill value.

Three methods of valuation of goodwill have received the most definite judicial sanction: the years' purchase of average excess profits,[1] the capitalization of average excess profits,[2] and the years' purchase of average net profits.[3] Under the third method, the annual net profits of a business for

[1]This is the method generally followed now by the New York courts. Matter of Seaich, 170 App. Div. 686, 156 N. Y. Supp. 579 (1st Dep't 1915), *aff'd w. o. op.* 219 N. Y. 634, 114 N. E. 1083 (1916) (valuation of shares of holder dissenting to a consolidation); *In re* Demarest's Estate, 157 N. Y. Supp. 653 (Surr. Ct. 1914) (transfer tax on corporate shares); Von Au v. Magenheimer, 115 App. Div. 84, 100 N. Y. Supp. 659 (2d Dep't 1906) (action for fraud in sale of stock); *id.*, 126 App. Div. 257, 110 N. Y. Supp. 629 (2d Dep't 1908) *aff'd w. o. op.* 196 N. Y. 510, 89 N. E. 1114 (1909); *In re* Wirth's Estate, 119 Misc. 736, 197 N. Y. Supp. 365 (Surr. Ct. 1922) (transfer tax on corporate shares); CASTENHOLZ, AUDITING PROCEDURE (1931) 92-93; DAY, ACCOUNTING PRACTICE (1924) 81-82; 1 FINNEY, PRINCIPLES OF ACCOUNTING (1937) 312; JOHNSON, PRINCIPLES OF ACCOUNTING (1937) 528; KESTER, ADVANCED ACCOUNTING (3rd ed. 1933) 387-389; 1 LANGER, ACCOUNTING PRINCIPLES AND PROCEDURE (1933) 278-279; MCKINSEY AND NOBLE, ACCOUNTING PRINCIPLES (2d ed. 1939) 403; PICKLES, ACCOUNTANCY (1934) 939; HYDER, VALUATION OF LEASEHOLDS AND GOODWILL, (1926) 19; LAWYER AND BANKER 101. This method was approved of in Ahlenius v. Bunn & Humphreys, Inc., 358 Ill. 155, 192 N. E. 824 (1934). See also Pett v. Spiegal, 202 N. Y. Supp. 650 (Sup. Ct. 1923) (where detailed report on value of goodwill by referee is reprinted and approved in action of accounting).

[2]White & Wells Co. v. Comm'r of Internal Revenue, 50 F. (2d) 120 (C. C. A. 2d 1931) (income and profits taxes); Pfleghar Hardware Specialty Co. v. Blair, 30 F. (2d) 614 (C. C. A. 2d 1929) (income and profits taxes); *In re* Weatherbee's Estate, 157 N. Y. Supp 652 (Surr. Ct. 1913) (transfer tax on proprietorship); Stewart, Ex'r Perry Estate, 32 B. T. A. 442 (1935) (income tax); National Bank of Commerce in New York, Trustee, 17 B. T. A. 1266 (1929) (income tax); Appeal of Grand Trust and Savings Co., Trustee, 3 B. T. A. 1026 (1926) (income tax); Appeal of the Executors of the Estate of Jacob Fish, 1 B. T. A. 882 (1925) (value of stock under estate tax); Appeal and Review Memorandum of Bureau of Internal Revenue 34 (2 C. B. 31). See also Waterbury v. Waterbury, 279 Ky. 254, 128 S. W. (2d) 568 (1939) (capitalization of excess profits referred to but not applied because of lack of data); BELL & POWELSON, AUDITING (1938) 242; BUDD & WRIGHT, INTERPRETATION OF ACCOUNTS (1927) 317; CANNING, THE ECONOMICS OF ACCOUNTANCY (1929) 306; 4 COX, BUSINESS ACCOUNTING (1920) 253-255; GOGGIN & TONER, ACCOUNTING PRINCIPLES AND PROCEDURE (1930) 405-406; GRAHAM & KATZ, ACCOUNTING IN LAW PRACTICE (2d ed. 1938) 278; JOHNSON, PRINCIPLES OF ACCOUNTING (1937) 528; KOHLER & MORRISON, PRINCIPLES OF ACCOUNTING (1931) 361; 1 LANGER, ACCOUNTING PRINCIPLES AND PROCEDURE (1933) 275-276; MCKINSEY & NOBLE, ACCOUNTING PRINCIPLES (2d ed. 1939) 403; MONTGOMERY, AUDITING, THEORY AND PRACTICE (5th ed. 1934) 319; NEWLOVE, SMITH & WHITE, INTERMEDIATE ACCOUNTING (1939) 293-294.

[3]*In re* Hall's Estate, 94 N. J. Eq. 398, 119 Atl. 669 (1923) (transfer tax on partnership interest); *In re* Dupignac's Estate, 123 Misc. 21, 204 N. Y. Supp. 273 (Surr. Ct. 1924), *aff'd w. o. op.* 211 App. Div. 862, 207 N. Y. Supp. 833 (1924) (transfer tax on corporate stock); *In re* Silkman, 121 App. Div. 202, 105 N. Y. Supp. 872 (2d Dep't 1907) (final accounting by executors); Steinweig v. Epstein, 152 Misc. 24, 271 N. Y. Supp. 263

a particular period previous to the date of valuation are computed. These amounts are then averaged to find the average annual net sum multiplied by a number representing the number of years during which such profits are expected to continue. The first two methods, although mathematically different, are substantially similar. Under the years' purchase of average excess profits method, the average annual net profits of the business are determined as in the previous formula. Then the amount of capital employed is found and on this amount the normal return which might be expected on capital is computed. This amount of normal return is deducted from the average annual net profits to find the average annual excess profits of the business. The goodwill is equal to this amount multiplied by a number representing a certain number of years as in the previous method. The formula similar to this is the capitalization of the average annual excess profits. By this, the goodwill is equal to the average annual excess profits divided by a certain percentage. Thus if the goodwill is capitalized at 20% it is the same as multiplying the excess profits by five as in the years' purchase method.

Several problems are common to all three methods of goodwill evaluation. The first of these involves the determination of annual net profits. On this point little legal authority can be found, at least as to the determination of net profits for this precise purpose. However, an accounting text,[4] in dealing with the problem, indicates the following procedures: (1) extraordinary profits or losses not due to the ordinary operation of the business should be eliminated; (2) interest computed on borrowed money should not be included; (3) adequate reserves for depreciation should be provided for; (4) charges to operating expenses on account of repairs should be adequate; (5) sales effected in a subsequent period are not to be included in the accounts of the period under review so as to inflate the profits, and shipments made to merchants or on consignment accounts should

(Sup. Ct. 1934) (accounting by coadventurer); *In re* Schlossman's Adm'x, 136 Misc. 893, 242 N. Y. Supp. 417 (Surr. Ct. 1930) (final accounting by administratrix); *In re* Ulrici's Estate, 111 Misc. 55, 182 N. Y. Supp. 516 (Surr. Ct. 1920) (transfer tax on partnership interest); *In re* Hearn's Estate, 182 N. Y. Supp. 363 (Surr. Ct. 1917) (transfer tax on partnership interest); *In re* Ottman's Estate, 166 N. Y. Supp. 1078 (Surr. Ct. 1917) (inheritance tax on corporate shares); *Matter of* Gumbinner, 92 Misc. 104, 155 N. Y. Supp. 188 (Surr. Ct. 1915) (transfer tax on partnership interest); *In re* Welch, 77 Misc. 427, 137 N. Y. Supp. 941 (Surr. Ct. 1912) (judicial settlement by executor); *In re* Moore, 69 Misc. 535, 127 N. Y. Supp. 884 (Surr. Ct. 1910) (judicial settlement by executors); *In re* Keahon's Estate, 60 Misc. 508, 113 N. Y. Supp. 926 (Surr. Ct. 1908) (transfer tax on proprietorship); BUDD & WRIGHT, INTERPRETATION OF ACCOUNTS (1927) 316; 4 COX, BUSINESS ACCOUNTING (1920) 254; CROPPER, BOOKKEEPING AND ACCOUNTS (1920) 417; 1 FINNEY, PRINCIPLES OF ACCOUNTING, INTERMEDIATE (1927) 312; GOGGIN & TONER, ACCOUNTING PRINCIPLES AND PROCEDURE (1930) 405; JOHNSON, PRINCIPLES OF ACCOUNTING (1937) 528; KESTER, ADVANCED ACCOUNTING (3d ed. 1933) 390; 1 LANGER, ACCOUNTING PRINCIPLES AND PROCEDURE (1933) 279. This method is generally followed by the English courts. Mallerish v. Keen, 28 Beav. 453, 54 Eng. Rep. 440 (1860) (dissolution of partnership); Page v. Ratliffe, 75 L. T. R. 371 (1896) (sale of partnership interest). The question has also arisen under the English Landlord and Tenant Act of 1927. See (1931) 75 SOL. J. 502; (1929) 73 SOL. J. 580. For a discussion of the correct method of evaluation goodwill for purposes of death duties, see (1938) 82 SOL. J. 805.

[4] 4 COX, BUSINESS ACCOUNTING (1920) 253-255.

not be regarded as sales; (6) the inventory should be carefully checked, certified by the persons making it, and should be valued at cost or market, whichever is the lower, proper allowance being made for old or obsolete material; (7) ample provision should be made for all liabilities or expenses incurred in the period under review and outstanding at the close thereof.

The period over which the annual net profits are averaged has been the subject of some difference of opinion. The object of taking an average is to arrive at the profit figure which, on the basis of past experience, can reasonably be expected to continue under normal circumstances.[5] The number of years taken for the average is not inflexible.[6] The period used has varied from three years to fourteen years,[7] although it is ordinarily not less than five years.[8] Abnormal years within the period must be provided for.[9] An abnormally high year may be balanced by the inclusion of an abnormally low year.[10] The average profits, however, for a number of years is not a conclusive index, for, in the final analysis, stability and trend are equally important.[11]

The question of the number of years' purchase of profits is the same whether the purchase is of average annual net profits or of average excess profits.[12] There is no set rule for the number of years' purchase.[13] It resolves itself into a question of fact depending upon the circumstances in

[5]CROPPER, BOOKKEEPING AND ACCOUNTS (1920) 417.

[6]Waterbury v. Waterbury, 278 Ky. 254, 128 S. W. (2d) 568 (1939) (winding up of partnership); 2 BONBRIGHT, VALUATION OF PROPERTY 729, n. 112.

[7]*In re* Ottman's Estate, 166 N. Y. Supp. 1078 (Surr. Ct. 1917) (three years inheritance tax on corporate shares); Matter of Halle, 103 Misc. 661, 170 N. Y. Supp. 898 (Surr. Ct. 1918) (four years) (transfer tax on partnership interest); *Matter of* Ball, 161 App. Div. 79, 146 N. Y. Supp. 499 (2d Dep't 1914) (transfer tax on partnership interest); *In re* Ulrici's Estate, 111 Misc. 55, 182 N. Y. Supp. 516 (Surr. Ct. 1920) (transfer tax on partnership interest); Matter of Gumbinner, 92 Misc. 104, 155 N. Y. Supp. 188 (Surr. Ct. 1915) (each five year average) (transfer tax on partnership interest); Plaut v. Lynch, 231 App. Div. 605, 248 N. Y. Supp. 61 (3rd Dep't 1931) (five or six year average) (income tax); *In re* Dupignac's Estate, 123 Misc. 21, 204 N. Y. Supp. 273 (Surr. Ct. 1924), *aff'd w. o. op.* 211 App. Div. 862, 207 N. Y. Supp. 833 (1924) (six year average) (transfer tax on corporate stock); *Appeal of* Hovey Company, 4 B. T. A. 175 (1926) (fourteen year average) (income and profit tax).

[8]White & Wells Co. v. Comm'r of Internal Revenue, 50 F. (2d) 120 (C. C. A. 2d 1931) (income and profits taxes).

[9]Matter of Bolton, 121 Misc. 21, 200 N. Y. Supp. 325 (Surr. Ct. 1923) (transfer tax on corporate stock); Matter of Lincoln, 114 Misc. 45, 185 N. Y. Supp. 574 (Surr. Ct. 1920) (transfer tax on partnership interest).

[10]Matter of Ball, 161 App. Div. 79, 146 N. Y. Supp. 499 (2d Dep't 1914) (transfer tax on partnership interest); *In re* Demarest's Estate, 157 N. Y. Supp. 653 (Surr. Ct. 1914) (transfer tax on corporate shares). *But see* Plaut v. Lynch, 231 App. Div. 605, 248 N. Y. Supp. 61 (3rd Dep't 1931) (income tax). However in White & Wells Co. v. Comm'r of Internal Revenue, 50 F. (2d) 120 (C. C. A. 2d 1931) (income and profits taxes) and Matter of Bijur, 127 Misc. 206, 216 N. Y. Supp. 523 (Surr. Ct. 1926) (transfer tax on partnership interest) the abnormal years were eliminated from the average base.

[11]1 LANGER, ACCOUNTING PRINCIPLES AND PROCEDURE (1933) 276.

[12]This method is considered the most scientific since the element of capitalization of the corporation is given its due weight. See (1938) 82 Sol. J. 7.

[13]Matter of Bolton, 121 Misc. 51, 200 N. Y. Supp. 325 (Surr. Ct. 1923) (transfer tax on corporate stock).

a particular case.[14] It is impossible to reconcile the cases.[15] Certain facts do materially influence the court's decision. The length of the previous existence of the business is an important factor.[16] This fact, however, has been given slight weight in a case where the sales had increased steadily since the establishment of the business.[17] The fact that a great amount of money had been spent on advertising is also to be considered.[18]

In the application of the methods of evaluation dependent upon excess profits, the amount to be deducted as return on capital invested is not static.[19] The determining factor is the nature of the business. If great risk is involved, the return allowed is greater than where there is little hazard, as in the case of manufacture or sale of standard articles of everyday necessity.[20]

Other methods have been presented by various authorities on accounting. They are: (1) goodwill is equal to the capitalization of the average profits at an arbitrary rate minus the agreed value of the net assets excluding goodwill;[21] (2) goodwill is equal to the volume of sales for a given period with adjustments for changing price levels and elimination of extraneous factors;[22] (3) goodwill is equal to the number of years' purchase of the sales averaged for a period of years;[23] (4) goodwill is equal to the years' purchase of the past annual profits;[24] (5) goodwill is equal to the difference between the market price of the stock and the book value, multiplied by the

[14] *In re* Dupignac's Estate, 123 Misc. 21, 204 N. Y. Supp. 273 (Surr. Ct. 1924), *aff'd w. o. op.* 211 App. Div. 862, 207 N. Y. Supp. 833 (1924) (transfer tax on corporate stock); Matter of Bolton, 121 Misc. 51, 200 N. Y. Supp. 325 (Surr. Ct. 1923) (transfer tax on corporate stock); Von Au v. Magenheimer, 115 App. Div. 84, 100 N. Y. Supp. 659 (2d Dep't 1906) (action for fraud in sale of stock); *id.*, 126 App. Div. 257, 110 N. Y. Supp. 629 (2d Dep't 1908), *aff'd w. o. op.* 196 N. Y. 510, 89 N. E. 1114 (1909); Appeal of Grand Trust and Savings Company, Trustee, 3 B. T. A. 1026 (1926) (income tax); See 5 PAUL AND MERTENS, LAW OF FEDERAL INCOME TAXATION 760-761.

[15] *In re* Ulrici's Estate, 111 Misc. 55, 182 N. Y. Supp. 516 (Surr. Ct. 1920) (transfer tax on partnership interest).

[16] For a collection of cases see *In re* Dupignac's Estate, 123 Misc. 21, 31, 204 N. Y. Supp. 273 (Surr. Ct. 1924) *aff'd w. o. op.* 211 App. Div. 862, 207 N. Y. Supp. 833 (1924) (transfer tax on corporate stock); *In re* McMullen's Estate, 92 Misc. 637, 647, 157 N. Y. Supp. 655 (Surr. Ct. 1915) (transfer tax on corporate stock).

[17] *In re* Flurscheim's Estate, 107 Misc. 470, 176 N. Y. Supp. 694 (Surr. Ct. 1919) (transfer tax on partnership interest).

[18] *In re* Flurscheim's Estate, 107 Misc. 470, 176 N. Y. Supp. 694 (Surr. Ct. 1919) (transfer tax on partnership interest); *In re* Hearn's Estate, 182 N. Y. Supp. 363 (Surr. Ct. 1917) (transfer tax on partnership interest).

[19] Appeal of Grand Trust and Savings Company, Trustee, 3 B. T. A. 1026 (1926) (income tax). NEWLOVE, SMITH & WHITE, INTERMEDIATE ACCOUNTING (1939) 293-294.

[20] See BUREAU OF INTERNAL REVENUE APPEAL AND REVIEW MEMORANDUM 34 (2 C. B. 31).

[21] BUDD & WRIGHT, INTERPRETATION OF ACCOUNTS (1927) 317; 1 FINNEY, PRINCIPLES OF ACCOUNTING, INTERMEDIATE (1937) 313; GRAHAM & KATZ, ACCOUNTING IN LAW PRACTICE (2d ed. 1938) § 183; KESTER, ADVANCED ACCOUNTING (3rd ed. 1933) 390-391; KOHLER & MORRISON, PRINCIPLES OF ACCOUNTING (1931) 361-362; PICKLES, ACCOUNTANCY (1934) 940.

[22] BUDD & WRIGHT, INTERPRETATION OF ACCOUNTS (1927) 320-322.

[23] BROWNELL, ACCOUNTING AND FINANCE (1929) 126-128.

[24] FINNEY, PRINCIPLES OF ACCOUNTING, INTERMEDIATE (1937) 311; GOGGIN & TONER, ACCOUNTING PRINCIPLES AND PROCEDURE (1930) 405.

number of shares.[25] These suggested devices for determining the value of goodwill have received little, if any, legal support.

In this discussion of the methods by which goodwill may be evaluated, it must be remembered that the figure at which this intangible is carried on the balance sheet of a business or at which it is figured for purposes of a report to stockholders, may be far different from any value arrived at by an application of one of the foregoing formulae. Many businesses carry goodwill at one dollar and it is accepted accounting practice to do so. Nevertheless, where the asset must be evaluated, the balance sheet figure is not conclusive and resort to an independent computation is uniformly made.

No one method can be used exclusively where goodwill must be evaluated.[26] If an accurate computation is to be made each should be considered. It must be remembered also that in the evaluation of goodwill, certain intangible factors which constitute it must be kept in mind. These factors can seldom be computed by any mathematical formula. The result of any formula is at best an approximation, which must be considered in the light of all elements, both tangible and intangible. It is only when all factors are considered that one may estimate with any degree of assurance the value of the goodwill of a business enterprise.

Robert S. Lesher

Corporations: Tort liability of directors and officers.—In *McGuire* et ux. *v. Louisiana Baptist Encampment, Inc.* et al., *199 So. 192 (La. App. 1940),* the plaintiff's son, while attending an encampment conducted by a non-trading corporation, was drowned when he fell from a boat taken by him and others without permission. The parents sued the corporation and the president for the son's death, on the theory that the president was negligent in directing the boat to be obtained and kept in a place where the boys could find it. *Held:* The president was not liable.

It is clear that a corporate director or officer is liable for a misfeasance or positive wrong which he individually commits. For example, if the president of a corporation were to assault a person in his office—whether for personal reasons or reasons connected with his official duties—he will be held liable.[1] Similarly, a director or officer is liable if he knowingly participates in or directs the commission of the tort.[2] Thus, officers who

[25]MONTGOMERY, AUDITING THEORY AND PRACTICE (5th ed. 1934) 312.

[26]There are some instances where goodwill has been evaluated without the use of any definite formula. National Casket Co. Inc. v. Heiner, 4 F. Supp. 351 (D. C. 1933) (goodwill was based on uncontradicted testimony of three witnesses) (income and profits taxes); Moore v. Rawson, 185 Mass. 264, 70 N. E. 64 (1904) (accounting by partner against other partners). *Cf.* Boggs & Buhl, Inc. v. Comm'r of Internal Revenue, 34 F. (2d) 859 (C. C. A. 3d 1929) (determination of invested capital for tax purposes). See also 2 CORP. REORG. (1936) 287.

[1]Gloster Lumber Co. v. Wilkinson, 118 Miss. 289, 79 So. 96 (1918); McCrea v. McClenahan *et al.,* 131 App. Div. 247, 115 N. Y. Supp. 720 (2d Dep't 1909); Nunnelly v. Southern Iron Co., 94 Tenn. 397, 29 S. W. 361 (1895).

[2]Folwell v. Miller, 145 Fed. 495 (C. C. A. 2d 1916) (president of newspaper not liable for published libel in which he did not participate); O'Connell v. Union Drilling,

fraudulently make representations in connection with the sale of corporate stock will be held liable.[3] Likewise, an officer who actually directs or authorizes a corporate employee to cut timber on a third person's land will be held liable for the resulting damage.[4] It is no defense in such cases that the defendant was acting in his official capacity, or that the corporation may be liable. The third person generally may hold either the corporation or the officer, or both jointly.[5]

Liability will be imposed also on the officer when he is in fact a principal rather than an agent. Thus, it has been held that where an officer told an agent to use a company car on a personal errand for him, such officer was liable as principal for the resulting injury.[6] Likewise, an officer, who is the dominating force in a corporation, will be held individually liable as principal for the commission of a tort that he commands. Courts will not allow a person to use an irresponsible corporation to avoid liability in carrying out his own plans.[7]

The most difficult type of case is one where the director or officer is not the main wrongdoer or does not actively participate in a tort which is committed through other officers or agents, and an attempt is made to hold him liable along with the corporation. Here, non-participation by the officer and lack of knowledge and consent on his part will usually relieve him. Thus, if an officer tells an agent to cut timber on the company's land and the agent negligently or wilfully cuts timber on a third person's land, the officer will not be liable to such person.[8] Similarly, an officer will not be held where a subordinate employee makes fraudulent statements to induce the purchase of land, and the officer personally took no part in the misrepresentation, had no knowledge of it and gave no consent.[9]

There are certain cases in which the officer or director has been held for a tort in which he has not actively participated or directed that it be committed. The court, in these cases, has found that the officer or director either has consented to the commission of the tort,[10] or actually knew that

etc., 121 Cal. App. 302, 8 P. (2d) 867 (1932); Beeler & Campbell Supply Co. v. Riling, 132 Kan. 499, 296 Pac. 365 (1931); Haefeli v. Woodrich Engineering Co., 255 N. Y. 442, 175 N. E. 123 (1930), *affirming* 229 App. Div. 742, 241 N. Y. Supp 896 (2d Dep't 1930).

[3]Barry *et al.* v. Legler, 39 F. (2d) 297 (C. C. A. 8th 1930).

[4]Dunn v. Griffith, 137 So. 766 (La. App. 1931); Peck v. Cooper, 112 Ill. 192 (1894) (president, without authority, directed negroes be put off company's cars; held liable); Hewett v. Swift, 3 Allen (85 Mass.) 420 (1862); Messenger v. Frye *et al.*, 176 Wash. 291, 28 P. (2d) 1023 (1934).

[5]Snowden v. Taggart, 91 Colo. 525, 17 P. (2d) 305 (1932); Coffer v. Bradshaw, 46 Ga. App. 143, 167 S. E. 119 (1932); Deobes v. Butterly, 210 App. Div. 50, 205 N. Y. Supp. 104 (1st Dep't 1924).

[6]Stegman v. Sturtevant & Haley Beef & Supply Co., 243 Mass. 269, 137 N. E. 363 (1922).

[7]Southwestern Tool Co. *et al.* v. Hughes Tool Co., 98 F. (2d) 42 (C. C. A. 10th 1938); Terminal Barber Shops v. Zoberg, 28 F. (2d) 807 (C. C. A. 2d 1928); Hitchcock v. Am. Plate Glass, 259 Fed. 948 (C. C. A. 3rd 1919).

[8]Tauscher v. Doernbecher Mfg. Co., 153 Ore. 152, 56 P. (2d) 318 (1936); Beauchamp v. Winnsboro Granite Corp., 113 S. C. 522, 101 S. E. 856 (1920); Parker v. Cone, 104 Vt. 421, 160 Atl. 246 (1932).

[9]Patzman v. Howey, 340 Mo. 11, 100 S. W. (2d) 851 (1936).

[10]Williams v. Riddlesperger, 217 Ala. 62, 114 So. 796 (1927); Rives v. Bartlett, 215

it was being committed by an agent under his control and took no steps to prevent it. So if it can be shown that an officer had knowledge of misrepresentations being made by agents under his control in the sale of stock, he will be held liable.[11] These tests of participation, direction, and consent are held to apply in cases involving a "malfeasance" or "misfeasance" or "positive wrong".

As a general rule, then, it would appear that the courts do not impose liability on a director or officer unless he has been guilty of some active participation in the tort or has in some other way committed what is called "misfeasance" or "positive wrong".[12] Mere "nonfeasance"—or complete failure to act—ordinarily will not be sufficient.[13] An exception is raised in most jurisdictions as to dangerous premises. It is generally held that where a corporation is under a duty to safeguard the premises, a corporate officer, charged with carrying out of this duty will be liable to the public for injuries resulting from his failure to act. The officer's inaction is said to be not only a breach of duty to the corporation but also to the general public. In other words, an officer in charge of dangerous premises is subject to the same liability to the public as if he were the owner and operator.[14]

The principal case seems to have been decided properly, since it was not shown that the president of the corporation actually participated in or directed the events causing the boy's death. In fact, no negligence at all on his part or that of the corporation was shown as the proximate cause of the boy's death.

Ronald E. Coleman

N. Y. 33, 101 N. E. 83 (1915) (director not liable for misrepresentation in a prospectus issued by co-directors without his knowledge or consent); Tauscher v. Doernbecher Mfg. Co., 153 Ore. 152, 56 P. (2d) 318 (1936). As to the question of ratification see Parker v. Cone, 104 Vt. 421, 160 Alt. 246 (1932).

[11]Barry *et al.* v. Legler, 39 F. (2d) 297 (C. C. A. 8th 1930); Thomsen v. Culver City Motor Co., 4 Cal. App. (2d) 639, 41 P. (2d) 597 (1935) (directors not liable for conversion by officers in absence of knowledge); Tibbetts v. Wentworth, 248 Mass. 468, 143 N. E. 349 (1924).

[12]Barry v. Legler, 39 F. (2d) 297 (C. C. A. 8th 1930); Fusz v. Spaunhorst, 67 Mo. 256 (1878); Darling & Co. v. Fry, 24 S. W. (2d) 722 (Mo. App. 1930). Conrick v. Houston Civic Opera Ass'n, 99 S. W. (2d) 382 (Tex. Civ. App. 1936).

[13]Rudisill Soil Co. v. Eastham Soil Pipe & Foundry Co., 210 Ala. 145, 97 So. 219 (1923); Beeler & Campbell Supply Co. v. Riling, 132 Kan. 499, 296 Pac. 365 (1931); O'Neil v. Young, *etc.* Seed Co., 58 Mo. App. 628 (1894); Lough v. John Davis & Co., 30 Wash. 204 (1902).

[14]Mayer v. Thompson-Hutchinson Bldg. Co., 104 Ala. 611, 16 So. 620 (1894) (Supt. of the construction of a building liable for failure to erect proper scaffolding); Pirtle's Adm'x v. Hargis Bank & Trust Co., 241 Ky. 455, 44 S. W. (2d) 541 (1931); Cameron v. Kenyon-Connell & Co., 22 Mont. 312, 56 Pac. 358 (1899); Hoeverman v. Feldman, 220 Wis. 557, 265 N. W. 580 (1936); 1 MECHEM, AGENCY (2d ed. 1914 §§ 1474-78. *Contra:* Delaney v. Rochereau, 34 La. Ann. 1123 (1882); Grennauer v. Sheridan-Brennan Realty Co., 224 App. Div. 199, 229 N. Y. Supp. 719 (4th Dep't 1928) (president in charge of building owned by corporation not liable to third person for disrepair of stairway—mere "nonfeasance"). For full discussion of the doctrine of "nonfeasance", see 2 CLARK AND SKLYES, AGENCY (1905) §§ 593-607; 1 MECHEM, AGENCY (2d ed. 1914) §§ 1464-81; Notes (1930) 9 TEX. L. REV. 224, (1930) 43 HARV. L. REV. 959.

Equity: Specific performance: Covenants for title of vendor's heirs insufficient substitute for vendor's covenants.—An owner of land made a contract to convey it by a warranty deed. The title was to be given seven years from the date of the contract, when the vendee had completed payment. Partial payments were made before the vendor died. The vendor's heirs, after a decree of final distribution of the vendor's estate, sought specific performance of the contract from the vendee. They tendered a warranty deed from all the heirs of the vendor and their spouses. The court denied specific performance in *Funk v. Baird, 295 N. W. 87 (N. D. 1940)*.

The court reasoned that, as the heirs took from the vendor by descent rather than by conveyance, the vendor did not give any covenants for title to the heirs. The only covenants that they can tender are their own. The court refused to consider whether the substituted covenants would be more or less valuable than those of the vendor, saying that the vendee may have had good reason to insist on those of the vendor.

The court pointed out further that the plaintiffs would not be granted specific performance even if they were suing as assignees of the vendor. Three of the five covenants for title do not run with the land,[1] and the assignee could not transfer the benefit of them to the vendee.

The court's position is in accord with the general view that where the vendee is entitled to a deed containing the personal covenants of his vendor, he cannot be compelled to accept the covenants of a third party.[2] But this decision is not in accord with the weight of authority which makes an exception in regard to such a deed tendered by the vendor's heirs.[3]

Like the principal case, the cases in point do not give the exact wording of the promise by the vendor; nor is the particular issue discussed, whether

[1]The court held the provision for a warranty deed to include the covenants of seisin, of right to convey, against encumbrances, of quiet enjoyment, and of general warranty. By the weight of authority, the first three do not run with the land. 7 R. C. L. (1929), Covenants, §§ 49, 56; 109 A. L. R. 183 (1937).

[2]Steiner v. Zwickey, 41 Minn. 448, 43 N. W. 376 (1889); Walter v. DeGraaf, 19 Abb. N. C. (N. Y. 1887); Miner v. Hilton, 15 App. Div. 55, 44 N. Y. Supp. 155 (2d Dep't 1897); Gottschalk v. Meisenheimer, 62 Wash. 299, 113 Pac. 765 (1911). See Dalton v. Callahan, 122 Me. 178, 82, 119 Atl. 380, 382 (1923); 109 A. L. R. 183 (1937).

[3]Winn v. Strong, 196 Iowa 498, 194 N. W. 50 (1932); Barnett v. Morrison, 2 Litt. 69 (Ky. 1822); Gates v. McWilliams' Heirs, 6 Dana 42 (Ky. 1837). *Accord,* Barickman, Admr. v. Kuykendall, Admr. 6 Blackf. 21 (Ind. 1841); Wallenberg v. Rose, 41 Ore. 314, 68 Pac. 804 (1902). *Contra,* Spindle's Admr. v. Miller's Exc., 6 Munf. 170 (Va. 1818). *Cf.* Pritchard v. Mulhall, 140 Iowa 1, 118 N. W. 43 (1908) (where the vendee was held to have waived the vendor's covenants by refusing to accept them without cause); Taylor v. Porter, 1 Dana 421 (Ky. 1833) (where the vendor's legal representative got title to the land in another capacity).

It is acknowledged that the deed of the vendor's heirs or assignees is sufficient where the court assumes that all covenants for title run with the land. Big Ben Land Co. v. Hutchings, 71 Wash. 345, 128 Pac. 652 (1912); Rauch v. Zander, 138 Wash. 610, 245 Pac. 17 (1926). The right to the vendor's deed instead of that of a third person is waived by failure to object in time. Backman v. Park, 157 Cal. 607, 613, 108 Pac. 686, 688 (1910); Bigler v. Morgan, 77 N. Y. 312 (1879). A third person may compel specific performance if there are no covenants in the vendor's contract. *See* Noyes v. Brown, 142 Minn. 211, 218, 171 N. W. 803, 805 (1919). If there are only covenants which run with the land, the vendor's assignee's deed is sufficient. Gaven v. Hagen, 15 Cal. 208 (1860); Coral Gables v. Jones, 323 Pa. 425, 187 Atl. 434 (1912). *Cf.* Kimball v. Goodburn, 32 Mich. 10 (1875); Bateman v. Johnson, 10 Wis. 1 (1859) (where the court holds that it can make no difference to the vendee who the grantor was, as long as good title was conveyed).

or not the vendor's covenants are personal and irreplacable. Three of these cases regard the vendor's heirs' warranties as sufficient.[4] Only one holds in accord with the principal case.[5]

The decision in the principal case is debatable, for it seems that the merits of the vendee's defense are not really considered unless the court is "interested in whether or not the personal covenants of the heirs would be more or less valuable than those of the vendor,"[6] and unless the court requires more complete evidence of the intention of the parties.

Although covenants for title are sometimes called personal obligations, they are not personal in the sense of involving a continued confidential relation, or of personal skill or professional services, like the promise to paint a portrait or to give care and support to another person. Employment contracts are generally called personal, but if the deceased employer was to have no direct supervision over the employee's work, his death does not terminate the contract.[7] The promise to pay money is there performable by another. Covenants for title are in substance obligations to pay money on the failure of title in whole or in part. The heirs should be allowed to show themselves as able to pay as the vendor.

There may be this much of a personal element in the covenants, however; that they were made with a view to the credit and solvency of the vendor. But it seems that credit is a measurable factor. There are agencies which do give credit standings and presumably local creditors could well enlighten the court on the respective financial standings of the heirs and the vendor.

The court will not be involved in a comparison of credits if the vendor has assigned his land contract, however. The assignee has a remedy in securing the cooperation of the vendor. And while living, the vendor owes a duty to the vendee of fulfilling his contract obligations.[8]

Even if the heirs' credit be incorrectly estimated, no harm is likely to result to the vendee. The possibility of a suit on the covenants is very remote, for a marketable title must be tendered; and it is only in the event of a mistake in the title investigation that the purchaser will have to resort to the covenants. If the vendee demonstrates an encumbrance against the land, or even a reasonable doubt about the title, the court will not compel him to accept it.[9]

The court in the instant case said that the vendee may have had good

[4]Winn v. Strong, 196 Iowa 498, 194 N. W. 50 (1923); Barnett v. Morrison, 2 Litt. 69 (Ky. 1822); Gates v. McWilliams' Heirs, 6 Dana 42 (Ky. 1837) (which required the vendor's heirs to tender warranties to bind them only to the extent of the property received from their ancestor). This seems of dubious protection to the vendee. They might spend the inheritance or receive little.

[5]Spindle's Admx. v. Miller's Exc., 6 Munf. 170 (Va. 1818).

[6]Funk v. Baird, 295 N. W. 87, 90 (N. D. 1940).

[7]6 WILLISTON, CONTRACTS (Rev. ed. Williston and Thompson 1938) § 1941; 39 L. R. A. (N. S.) 1187 (1912).

[8]See Rice v. Gibbs, 40 Neb. 264, 58 N. W. 724 (1894); Coral Gables v. Jones, 323 Pa. 435, 187 Atl. 434 (1912) (where the vendor corporation became defunct, the court allowed specific performance to the vendor's assignee, since the vendor's covenants were worthless. The vendee showed no defect in title). Coral Gables v. Payne, 94 F. (2d) 593 (C. C. A. 4th 1938), noted in (1938) 51 HARV. L. REV. 1453, and (1938) 37 MICH. L. REV. 165.

[9]4 WILLISTON, CONTRACTS (Rev. ed. Williston and Thompson 1936) § 923; MAUPIN, MARKETABLE TITLES (1907), 706; WALSH ON EQUITY (1930), 377.

reason to contract for the vendor's covenants. In view of the nature of the covenants, it seems no hardship for an equity court to require an actual showing of these reasons. In this case especially the burden should be on the vendee to show that it was not the intention of the parties that the land and covenants be given by the vendor's heirs if the vendor died. Title to the land was not to pass until the date of final payment, seven years after the date of the contract. It is questionable if the vendee could reasonably have expected the vendor to live that long. She was old enough to have married, adult children. These facts seem adequate to shift the burden of going forward with the evidence to the defendant vendee.

The court also said that the vendee made no contract with the heirs, which is evident, and no contract to accept the heirs' covenants. The wording of this part of the contract is not given. Certainly there is no clear expression of intent *not* to accept the heirs' covenants. If the contract reads that the vendor covenants to give a warranty deed, the reasonable expectation is that the vendee wants primarily the land with a good title, and expects to take it even if the vendor dies.[10]

It may be urged that the death of the vendor causes a breach of the contract. There is no breach if the reasonable intent of the parties, expressed or implied, was to provide for a deed from the vendor or his heirs. The alternative parties are ready and able. If the parties intended a deed from the vendor only, and the vendor dies, thereby causing a breach of contract, it is doubtful that this is a material breach. The vendee would get substantial performance by receiving the land, a marketable title, and the covenants of the heirs. If he can show damages from the substitution of the heirs' covenants, he may join the vendor's administrator and collect them, in an appropriate action.

An analogy might be drawn to building contracts where payment is to be made only on the making of a certificate of approval by a certain architect, and that architect dies. The weight of authority allows the certificate of another architect, or treats this condition as one not material to the contract.[11]

Doris Heath

Evidence: Cross examination: Insulting questions.—On August 21, 1934, one of the armored trucks of the United States Trucking Company was held up and robbed of $427,000 in front of the Rubel Ice Plant at Bay 19th St. and Cropsey Ave. in Brooklyn. The holdup, which occurred in broad daylight, was perfectly staged and all the bandits escaped despite a great dragnet flung out by the police of five states. In the fall of 1938 the case was finally broken. John Stewart, a man of many aliases, told the authorities that nine men besides himself had committed the crime. On the strength of Stewart's story three of the men were apprehended, tried and convicted. One of them, Joseph Kress, appealed to the Appellate Division, which affirmed the judgment of the trial court.

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[10]Wallenberg v. Rose, 45 Ore. 615, 619, 78 Pac. 751, 752 (1902).

[11]3 WILLISTON, CONTRACTS (Rev. ed. Williston and Thompson 1936) §§ 796, 806. This is to avoid an unjust forfeiture against the builders. The rule should be applied in this case to prevent the vendee from escaping his just obligations.

The Court of Appeals reversed, principally on the ground that there was not sufficient corroboration of Stewart's testimony under Section 399 of the Code of Criminal Procedure. In the course of the opinion the Court also stated that it was error to permit the district attorney to question the defendant as to whether he had ever suffered from a venereal disease, without making any pretense of showing its materiality.[1] The statement of the Court on the latter point leads us to inquire how far the New York courts will permit counsel to go in asking this type of question.[2]

Generally stated, the test of admissibility is whether the asking of the question will assist the jury in finding out whether the witness is telling the truth.[3]

In view of this, it is not surprising to find that New York is committed to a rule which gives the trial court an almost complete discretion in determining what questions may he asked.[4] The existence of this discretion makes

[1]People v. Kress, 284 N. Y. 452, 31 N. E. (2d) 898 (1940). This is generally regarded as one of the most lucrative hauls in the annals of crime. In view of this it is interesting to note the fate of the principals. Stewart, when he confessed, was serving a 30 to 60 year term in Danemora for robbery; Francis Oley had committed suicide; John Manning was shot to prevent him from squealing; Benny McMahon died from a gunshot wound sustained by accident in the get-away; John Oley and Percy Geary were serving 70 year terms in Alcatraz for the famous O'Connell kidnapping; Kress, Quinn and Wallace were defendants here, and only Hughes is still alive and at large. On April 24, 1941, Kress was arrested after an attempted hold-up in the New York Athletic Club.

[2]For an exhaustive citation of cases from all jurisdictions on this point see 3 WIGMORE, EVIDENCE (3d ed. 1940) § 987.

[3]Thus it was *proper* to ask: defendant in a murder trial how he met the woman he was living with and the kind of life she was then leading, People v. Webster, 139 N. Y. 73, 34 N. E. 730 (1893); defendant in a murder trial whether he had drawn a pistol on two disreputable women in a saloon, two months before, People v. McCormick, 135 N. Y. 663, 32 N. E. 26 (1892); defendant in a murder trial as to possession of certain dies and plates, People v. Giblin, 115 N. Y. 196, 21 N. E. 1062 (1889); a witness in a murder trial if he was ever in the penitentiary and for how long, Real v. People, 42 N. Y. 270, 55 Barb. 551 (1870); the principal witness to prove loss in a fire insurance claim whether he had misrepresented the value of the stock in securing material on credit, prior to the fire, Howard v. City Fire Ins. Co., 4 Denio 502 (N. Y. 1842); a witness in an action arising out of a libel, whether he had been disbarred, Hyman v. Dworsky, 239 App. Div. 413, 267 N. Y. Supp. 539 (3d Dep't 1933); see also People v. Dorthy, 156 N. Y. 237, 50 N. E. 800 (1898); a witness in a murder trial whether he frequented houses of ill repute, People v. Fiori, 123 App. Div. 174, 108 N. Y. Supp. 416 (4th Dep't 1908); plaintiff in an assault action questions tending to show that she is a lewd woman, Osborne v. Seligman, 39 Misc. 811, 81 N. Y. Supp. 346 (App. Term 1903).

However, it was *improper* to ask: a witness in a personal injuries action whether he had been expelled from the fire department, Nolan v. Brooklyn C. & N. Railroad Co., 87 N. Y. 63, 41 Am. Rep. 345 (1881); a witness in a murder case if she were not in the habit of having carnal connection with men other than her husband, La Beau v. People, 34 N. Y. 223, 33 How. Pr. 66 (1866); defendant in a trial for larceny of a desk whether he had ninety dollars which belonged to a taxi association, People v. Martino, 256 App. Div. 406, 10 N. Y. S. (2d) 945 (3d Dep't 1939); a witness in a larceny case whether he had paid the rent on his restaurant, People v. Montlake, 184 App. Div. 578, 172 N. Y. Supp. 102 (2d Dep't 1918); AMERICAN LAW INSTITUTE, CODE OF EVIDENCE (Tent. Draft 2, 1941) § 106 (1) (b).

[4]People v. Enright, 221 App. Div. 26, 222 N. Y. Supp. 497 (4th Dep't 1927), *aff'd.* 248 N. Y. 633, 162 N. E. 554 (1928); People v. Slover, 232 N. Y. 264, 133 N. E. 633 (1921); People v. Braun, 158 N. Y. 558, 53 N. E. 529 (1899); People v. Tice, 131

it virtually impossible to extract a definite rule from the cases, the tendency being to uphold the ruling of the lower court. However, there are cases holding that the bounds have been exceeded.[5]

Regardless of relevancy it is permissible to show a prior conviction. This is statutory.[6] The witness is required to answer questions concerning the conviction and the interrogator is not bound by negative answers as he is in other situations.[7] This is a matter of policy which has been settled by legislation; and if the principal case is to be accepted at its face value the terms of the statute represent the limit to which counsel may go in this respect.

The decisions indicate that in a criminal prosecution when the defendant takes the stand in his own behalf the latitude of the cross examination will be somewhat restricted. It is true that the privilege against self-incrimination does not arise to impede the district attorney in posing insulting questions.[8] However, the feeling has existed that the defendant's case should not be unduly prejudiced by allowing the prosecution a free hand to question on collateral matters.[9] The instant case defines the restriction in terms of materiality.

N. Y. 651, 30 N. E. 494 (1892); People v. Clark, 102 N. Y. 735, 8 N. E. 38 (1886); Langley v. Wadsworth, 99 N. Y. 61, 1 N. E. 106 (1885); People v. Irving, 95 N. Y. 541 (1884); People v. Court, 83 N. Y. 436 (1881); Southworth v. Bennett, 58 N. Y. 659 (1874); Connors v. People, 50 N. Y. 240 (1872); Real v. People, 42 N. Y. 270 (1870); Shepherd v. Parker, 36 N. Y. 517 (1867); Greton v. Smith, 33 N. Y. 245, 250 (1865); President & Directors of the Third G. W. Turnpike Road Co. v. Loomis, 32 N. Y. 127 (1865); AMERICAN LAW INSTITUTE, CODE OF EVIDENCE (Tent. Draft 2, 1941) § 403 provides for a wide discretion in the trial judge in this respect.

[5]People v. Freeman, 203 N. Y. 267, 96 N. E. 413 (1911); People v. Dorthy, 156 N. Y. 237, 50 N. E. 800 (1898); People v. Martino, 256 App. Div. 406, 10 N. Y. S. (2d) 945 (3d Dep't 1939); People v. Bloodgood, 251 App. Div. 593, 298 N. Y. Supp. 91 (3d Dep't 1937); Geiger v. Weiss, 245 App. Div. 817, 281 N. Y. Supp. 154 (2d Dep't 1935); McWharf v. Webber, 222 App. Div. 347, 225 N. Y. Supp. 761 (4th Dep't 1927); People v. Montlake, 184 App. Div. 578, 172 N. Y. Supp. 102 (2d Dep't 1918); Osborne v. Seligman, 39 Misc. 811, 81 N. Y. Supp. 346 (App. Term 1903).

[6]N. Y. CIV. PRAC. ACT § 350; N. Y. PENAL LAW § 2444; People v. Cardillo, 207 N. Y. 70, 100 N. E. 745 (1912); Spiegel v. Hays, 118 N. Y. 660, 22 N. E. 1105 (1889); People v. Noelke, 94 N. Y. 137, 46 Am. Rep. 128 (1883); AMERICAN LAW INSTITUTE, CODE OF EVIDENCE (Tent. Draft 2, 1941) § 106 (1) (b) would limit the right to show a conviction in civil cases or in the case of a witness in a criminal action to convictions involving dishonesty and false statement; § 106 (3) denies the right to examine the defendant in a criminal action concerning any prior conviction unless he has put his character in issue.

[7]People v. Dietz, 216 App. Div. 23, 222 N. Y. Supp. 497 (4th Dep't 1926), *aff'd.* 244 N. Y. 534 (1926); Potter v. Browne, 197 N. Y. 288, 90 N. E. 812 (1910); People v. De Garmo, 179 N. Y. 130, 71 N. E. 736 (1904); Geiger v. Weiss, 245 App. Div. 817, 281 N. Y. Supp. 154 (2d Dep't 1935); RICHARDSON, EVIDENCE (5th ed. 1936) § 569. *But see* Brandon v. People, 42 N. Y. 265 (1870). However, it is not proper to question as to arrests, indictments or the posting of bonds to keep the peace; People v. Morrison, 194 N. Y. 175, 86 N. E. 1120 (1909); People v. Cascone, 185 N. Y. 317, 78 N. E. 287 (1906); Van Bokkelen v. Berdell, 130 N. Y. 141, 29 N. E. 254 (1891); People v. Crapo, 76 N. Y. 288, 32 Am. Rep. 302 (1879); McWharf v. Webber, 222 App. Div. 347, 225 N. Y. Supp. 761 (4th Dep't 1927).

[8]People v. Tice, 131 N. Y. 651, 30 N. E. 494 (1892); Connors v. People, 50 N. Y. 240 (1872).

[9]People v. Malkin, 250 N. Y. 185, 164 N. E. 900, noted (1929) 29 COL. L. REV. 526:

This seems proper not only in criminal cases but also in civil actions, and not only in the case of parties who take the stand as witnesses but also in cases of ordinary witnesses. There is some early New York authority which recognizes a privilege against answering a question that tends to disgrace unless it bears directly on the issue.[10] Not only is the opinion of Judge Rippey in the principal case supported by this early authority but it is also amply supported in reason. Immaterial questions can be justified only on the ground that they cast doubt on the veracity of the testimony. Since it has not yet been objectively demonstrated that an affliction such as a venereal disease impairs the credibility of the diseased or that a prostitute is less likely to tell the truth than a plumber, such questions should not be permitted.[11]

It is to be hoped that the Court will in a future case, involving an ordinary witness, give expression to the same rule. Such a change is justified for the same reason as has been set forth in the case of a defendant on the stand. Furthermore it is necessary as a matter of policy, in order to allay the fears of prospective witnesses that their private lives will be subjected to a microscopic scrutiny in the public courtroom.

George S. Dillon

International Law: Immunity of a foreign sovereign from suit: What is a sovereign state?—In *Sullivan v. State of Sao Paulo, 36 F. Supp. 503 (E. D. N. Y. 1941),* the plaintiff, suing on bonds issued by Sao Paulo, one of the federated states of the United States of Brazil, served a warrant of attachment upon the fiscal agent of the defendant state in the United States, attaching funds held by a New York depository for payment of such bonds. The issue of sovereign immunity was raised on behalf of Sao Paulo by the Brazilian Ambassador to the United States and under the circumstances of the particular case, as related in footnote 1, the court held that the interest

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action by a shopowner, arising out of a raid on the shop which occurred during a strike. Defendants were members of the striking union. They were asked whether the union had been expelled from the American Federation of Labor because of their violent activities. Were they communists? Whether their union was left wing? Whether they read radical newspapers? It was held that the cumulative effect of the questions tended to intensify the impression which the district attorney was endeavoring to create —that these were undesirable citizens. This was considered reversible error. People v. Richardson, 222 N. Y. 103, 118 N. E. 514 (1918): holding it to be error to allow a witness to be asked questions which undeniably went to the credibility of the witness because they incidentally tended to show that the defendant was of a criminal and degraded character. People v. Crapo, 76 N. Y. 288, 32 Am. Rep. 302 (1879); People v. Brown, 72 N. Y. 571, 28 Am. Rep. 183 (1878).

[10]People v. Blakeley, 4 Park. Cr. 176 (N. Y. 1859); Lohman v. People, 1 N. Y. 379, 49 Am. Dec. 340 (1848); People v. Mather, 4 Wend. 230 (N. Y. 1830).

[11]AMERICAN LAW INSTITUTE, CODE OF EVIDENCE (Tent. Draft 2, 1941) § 105 (f).

of Brazil in the funds was such as to entitle them to sovereign immunity.[1] Whether, if the Brazilian Ambassador had not interposed the claim for immunity, Sao Paulo officials might have done so, and whether there would be immunity for Sao Paulo if the facts did not so intimately connect the Sao Paulo and Brazilian finances, it was not actually necessary for the court to decide.

A sovereign state is not, without its consent, subject to suits in the courts of a foreign state.[2] The question arises then: what constitutes a state? "A permanently organized political society, occupying a fixed territory, and enjoying within the borders of that territory freedom from control by any other state, so that it is able to be a responsible agent before the world";[3] or "A 'State' is a member of the community of nations."[4] The actual decision in the main case rests upon the status of Brazil itself, a status about which there can be no question. Brazil meets every requirement for sovereign immunity if the latter is appropriately claimed.

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[1]Due to the economic depression the Brazilian government, in 1931, took over the fiscalization of all foreign exchange transactions and suspended service on its own external debts as well as that of its several states. With an improvement in international trade in Brazil, the government resumed service on these debts under the Aranha Plan, pursuant to which the states were obligated to include in their budgets appropriations sufficient to cover full service of their external debts. Such funds were deposited in the Bank of Brazil or other depository banks approved by the Brazilian government, subject to its order. Against payments out of these deposits, the Bank of Brazil would furnish necessary bills of exchange required to meet the contemplated remittances and would generally remit for the account of the Government of Brazil. It was understood by the fiscal agents that there could be no disposition of the funds except by the directions of the Brazilian government. This service was suspended in 1937, due to unfavorable economic conditions but was resumed under a similar plan in 1940, and was in force at the time of the present suit. (This case is also noted in (1941) 50 YALE L. J. 1088).

[2]The Navemar, 303 U. S. 68, 58 Sup. Ct. 432 (1938); Berizzi Bros. Co. v. S. S. Pesaro, 271 U. S. 562, 46 Sup. Ct. 611 (1926); *Ex parte* Muir, 254 U. S. 522, 41 Sup. Ct. 185 (1919); The Schooner Exchange v. M'Faddon, 7 Cranch 116, 32 L. ed. 287 (1812); Lamont v. Travelers Ins. Co., 281 N. Y. 362, 24 N. E. (2d) 81 (1939). See also Coudert, *International Law in Relation to Private Law Practice* (1926) 12 CORNELL L. Q. 13; Notes (1940) 25 CORNELL L. Q. 459, (1930) 15 CORNELL L. Q. 629.

[3]FENWICK, INTERNATIONAL LAW (2d ed. 1934) 86. See also WHEATON, INTERNATIONAL LAW (6th ed. 1929) 38. In 1 OPPENHEIM, INTERNATIONAL LAW (5th ed. 1937) §§ 63-111, the author lists as not-full sovereign states those states under the protectorate of another state, those under the suzerainty of another state, and member-states of a so-called Federated State. He then discusses Personal Unions, Real Unions, and Confederated States which are not considered as International Persons; Federated States which are recognized as International Persons; Vassal States, States under Protectorate and Mandated areas which are not regarded, as a general rule, as International Persons; and self-governing Dominions, Neutralized States, and the Holy See which are held to be International Persons.

[4]RESEARCH IN INTERNATIONAL LAW (Harvard Law School, 1932) "DRAFT CONVENTION ON DIPLOMATIC PRIVILEGES AND IMMUNITIES" p. 42, and "DRAFT CONVENTION ON COMPETENCE OF COURTS IN REGARD TO FOREIGN STATES" p. 475, Article 1(a). The authors' comments on page 475 are that the term would include the British Dominions but specifically exclude political subdivisions of a state (*e.g.*, Province of Ontario, Ohio, Toledo, Ohio). On page 483 of the comments is stated: "It seems to be correct to assert that the status in international law of the political subdivisions of a federated State is not the same as that of the federation itself, irrespective of their relation to the federation as defined in the respective constitutions."

The case, however, furnishes an occasion for examining the status of Sao Paulo if it alone were involved as debtor and claimant for immunity. " 'State' includes the government of a State and the head of a State, but does not include a political subdivision of a State."[5] Since Sao Paulo is a political subdivision of the United States of Brazil and lacks freedom from control by any other state, it is not a state as known to international law.[6] What privileges and immunities should such a political subdivision have? The general answer seems to lie within the option of the forum in which the case is tried. The authors of the second definition of a state given above comment, "No State is hereby precluded from according to political subdivisions of other States the privileges and immunities which this Convention requires it to accord to the States themselves."[7] The English courts in one case held that the Khedive of Egypt was not entitled to sovereign immunity since he was not recognized by "Her Majesty" as reigning sovereign of the State of Egypt. Turkey, the nominal sovereign in Egypt at that time, had not made any claim for the immunity.[8] The courts of France in another case held that the State of Céara of Brazil could not set up a plea of sovereign immunity when sued on loans it made in France.[9] In the United States of America one federal court treated the Commonwealth of Australia as entitled to sovereign immunity.[10] The New York courts allowed one of the states of the republic of Mexico to sue in their courts[11] and in a dictum stated that a department of Portugal could not be sued without its consent;[12] but a New Jersey court in a dictum expressed the belief that a state of the republic of Mexico could not set up a plea of immunity from judicial process since members of a federated re-

[5]RESEARCH IN INTERNATIONAL LAW (Harvard Law School, 1932) DRAFT CONVENTION ON COMPETENCE OF COURTS IN REGARD TO FOREIGN STATES, Article 1(a).

[6]"No diplomatic relations exist between the United States and the State of Sao Paulo. Diplomatic relations exist only with the United States of Brazil. In short, the State of Sao Paulo as a Federated State lacks 'external sovereignty'. . . ." Sullivan v. State of Sao Paulo, 36 F. Supp. 503, 504 (E. D. N. Y. 1941), quoting a letter from the United States Department of State to the judge in the case.

[7]RESEARCH IN INTERNATIONAL LAW (Harvard Law School, 1932) DRAFT CONVENTION ON COMPETENCE OF COURTS IN REGARD TO FOREIGN STATES, Article 1(a), Comments 483.

[8]The Charkieh, L. R. 4 Adm. & Ecc. 59 (1873).

[9]Etat de Céara v. Dorr, 2 Gaz. Pal. 614 (1928). For unrecognized and *de facto* governments the United States courts have held that although such a sovereign may not be sued in our courts without its consent [Wulfsohn v. Russian Federated Soviet Republic, 234 N. Y. 372, 138 N. E. 24 (1923)], yet, since a foreign power brings an action in our courts not as a matter of right but as a matter of comity, then until such government is recognized by the United States no such comity exists. Russian Socialist Federated Soviet Republic v. Cibrario, 235 N. Y. 255, 139 N. E. 259 (1923). See also Wright, *The Russian Government in Our Courts* (1925) 11 CORNELL L. Q. 49.

[10]*In re* Patterson-MacDonald Shipbuilding Co., McLean v. The Commonwealth of Australia, 293 Fed. 192 (C. C. A. 9th 1923). In this case the claim of immunity was made by the commissioner of the Commonwealth.

[11]State of Yucatan v. Argumendo, 92 Misc. 547, 157 N. Y. Supp. 219 (Sup. Ct. 1915). This suit was instituted by the authority of the state governor and not by the ambassador from Mexico.

[12]De Simone v. Transportes Maritimos Do Estado, 199 App. Div. 602, 191 N. Y. Supp. 864 (1st Dep't 1922). In this case the answer of the defendant which asserted immunity was verified by the Vice Consul General of Portugal.

public are treated as having no independent existence as a state in their external relations.[13] These last three decisions indicate that the state courts have not felt that there was any requirement of national uniformity in respect to the matter. The same defendant may thus be immune in one state and not in another so long as no treaty governs the topic.[14]

An analogy from the position of our own states' immunity under the United States Constitution should give guidance for courts in United States. The United States cannot be sued, without its consent, by a state.[15] A suit by one state against another is allowed. But this is so merely because the states by their own consent gave the United States Supreme Court such jurisdiction and delegated authority in order to perfect the union.[16] The United States may sue a constituent state without the latter's consent—but this, too, is a constitutional limitation on the state's sovereignty granted in order to preserve the permanence of the union;[17] and the constitutional surrenders of immunity are limited to their express terms. The Eleventh Amendment interposes an absolute bar to a suit against a state without its consent brought by citizens of another state[18] or by citizens or subjects of a foreign state.[19] The same principle stands behind the immunity of the states from suits brought against them by their own citizens,[20] by a foreign corporation,[21] or by a foreign state.[22] If the general relationship of the individual states to the federal government of Brazil is analogous to that of the states of United States of America to the United States of America, the State of Sao Paulo remains a sovereign except as to that which it has expressly surrendered to the Brazilian federal union.

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[13]Molina v. Commission Reguladora Del Mercado De Henequen, 91 N. J. L. 382, 103 Atl. 397 (1918). In this case the ambassador from Mexico in a letter to the State Department suggested that the property be immune, but the State Department refused to act upon it. The ambassador did not come to court to assert the plea of immunity.

[14]What the effect of *Erie v. Tompkins, 304 U. S. 64, 58 Sup. Ct. 817 (1938),* will be concerning international law in the federal courts presents an intriguing problem. For a general discussion on the topic see Jessup, *Doctrine of Erie Railroad v. Tompkins Applied to International Law,* (1939) 33 AM. J. INT. L. 740-3.

[15]Kansas v. United States, 204 U. S. 331, 27 Sup. Ct. 388 (1907).

[16]Arizona v. California, 283 U. S. 421, 51 Sup. Ct. 522 (1931); Wisconsin v. Illinois, 278 U. S. 367, 49 Sup. Ct. 163 (1928); Virginia v. West Virginia, 246 U. S. 565, 38 Sup. Ct. 400 (1918).

[17]United States v. Minnesota, 220 U. S. 181, 46 Sup. Ct. 298 (1926); United States v. Michigan, 190 U. S. 379, 23 Sup. Ct. 742 (1902); United States v. Texas, 143 U. S. 621, 12 Sup. Ct. 488 (1892).

[18]Hagood v. Southern, 117 U. S. 52, 6 Sup. Ct. 608 (1885); Louisiana v. Jumel, 107 U. S. 711, 2 Sup. Ct. 128 (1882).

[19]*In re* Ayers, 123 U. S. 443, 8 Sup. Ct. 164 (1887).

[20]Hans v. Louisiana, 134 U. S. 1, 10 Sup. Ct. 504 (1890).

[21]Smith v. Reeves, 178 U. S. 436, 20 Sup. Ct. 919 (1900).

[22]"In such a case, the grounds of coercive jurisdiction which are present in suits to determine controversies between States of the Union, or in suits brought by the United States against a state are not present. The foreign State lies outside the structure of the Union. The waiver or consent on the part of a State, which inheres in the acceptance of the constitutional plan, runs to other states who likewise accepted that plan, and to United States as the sovereign which the Constitution creates. We perceive no ground on which it can be said that any waiver or consent by a State of the Union has run in favor of a foreign State." Principality of Monaco v. Mississippi, 292 U. S. 313, 330, 54 Sup. Ct. 745, 751 (1934).

The status of a Brazilian state in the Brazilian Federation is not definitely expressed in the opinion in the *Sao Paulo* case,[23] but Judge Moscowitz remarked: "Sao Paulo is akin to a State of the United States which has been recognized as possessing sovereign immunity. While the absence of external sovereignty on the part of the State of Sao Paulo puts this court under no obligation as a matter of international law to accord sovereign immunity to the State of Sao Paulo, yet as a matter of comity and reciprocal treatment, the court is of the opinion that Sao Paulo should be recognized as possessing sovereign immunity."[24] The language is broad enough to warrant the statement that if the circumstances involved only Sao Paulo as a debtor and unconnected with Brazil itself, immunity would have been extended. How, procedurally speaking, this claim would be made is not adverted to in the opinion, although in the various cases[25] where claims to immunity were raised by governments other than complete sovereigns the methods used were the assertions to the court by a commissioner, the state governor, and a vice consul general, and a letter to the State Department by an ambassador suggesting the immunity.[26] How far this immunity should extend to other political subdivisions of a sovereign state (*e.g.*, a county, municipality, unincorporated village) presents an unsettled question.[27]

Edward R. Moran

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[23]On page 505 of the opinion, the court quoted a further letter addressed to it by the State Department concerning the status of the State of Sao Paulo.

[24]36 F. Supp. 503, 307 (E. D. N. Y. 1941).

[25]*Supra* notes 10-13.

[26]A discussion of the methods of asserting the claim of sovereign immunity in behalf of the accepted International Person may be found in ROBINSON, ADMIRALTY (1939) 258, and in an article by Angell, *Sovereign Immunity—the Modern Trend* (1925) 35 YALE L. J. 150, 164. For a discussion of the apparent conflict in the conclusiveness to be given a "suggestion" (a suggestion is a scheme in which the foreign state asserts a claim of immunity to our State Department which in turn through the Attorney General and the United States Attorney of the district in which the case is tried presents such suggestion of immunity to the court), see an article by Deak, *The Plea of Sovereign Immunity and the New York Court of Appeals* (1940) 40 COL. L. REV. 453, and Note (1940) 25 CORNELL L. Q. 459.

For the related topic of what interest in an instrumentality or property a state must have in order to shield it with the cloak of immunity, two succinctly given summaries appear in Ulen & Co. v. Bank Gospodarstwa Krajowego, 261 App. Div. 1, 24 N. Y. S. (2d) 201 (2d Dep't 1940); Hannes v. Kingdom of Roumania Monopolies Institute, 260 App. Div. 189, 20 N. Y. S. (2d) 825 (1st Dep't 1940). See also ROBINSON, ADMIRALTY (1939) 244-278; Harvey, *The Immunity of Foreign States When Engaged in Commercial Enterprises; A Proposed Solution* (1929) 27 MICH. L. REV. 751; Notes (1931) 31 COL. L. REV. 662; (1925) 10 CORNELL L. Q. 390.

[27]Within our own country the rule at common law was that a state or its political subdivisions could not be sued without express legislative sanction. Clarksdale Compress & Storage Co. v. Caldwell Co., 80 Miss. 343, 31 So. 790 (1902); Brooks v. One Motor Bus, Etc., 190 S. C. 379, 3 S. E. (2d) 42 (1939); Home Bldg. & Loan Ass'n. v. City of Spartanburg, 185 S. C. 353, 194 S. E. 143 (1937). Since legislation has been passed allowing such suits, it is now the general rule that a municipality engaging in proprietary as distinguished from governmental activities may be sued for causes of action arising therefrom. Eastern Union Co. v. Moffat Tunnel Dist., 6 W. W. Harr 488, 178 Atl. 864 (Del. 1935); Mayor and City Council of Baltimore City v. State, 173 Md. 103, 195 Atl. 571 (1937).

Libel: Defamation of the dead: Recovery by surviving relatives.—In recent years, the courts have been presented with considerable litigation involving libel and slander of deceased persons. With a high degree of consistency in the cases, the English courts and a majority of American jurisdictions, in the absence of a statute,[1] have refused to sustain a cause of action in behalf of the surviving relatives which alleged defamation of a deceased person. The sole satisfaction granted by the courts to the survivors is in the nature of criminal prosecution.[2] Diametrically opposed to the common law viewpoint is that of the Roman,[3] French,[4] and German codes,[5] all of which recognize libel of the dead as a legal wrong and permit recovery in a civil action.

Ancient as the problem is, it is noteworthy that prior to 1940, with the 4 to 3 decision in *Rose v. Daily Mirror, Inc., 284 N. Y. 335, 31 N. E. (2d) 182 (1940)*, apparently no case reached the New York Court of Appeals involving the unique problem of defamation of the dead. In the *Rose* case, the wife and children of one Jack Rose, deceased, brought an action for libel against the defendant newspaper, alleging that it had erroneously identified Mr. Rose as Baldy Jack Rose, a self-confessed murderer and notorious underworld character. The Appellate Division in a 3 to 2 decision granted a motion dismissing the complaint,[6] and the Court of Appeals affirmed, *holding:* ". . . a libel or slander upon the memory of a deceased person which makes no direct reflection upon his relatives gives them no cause of action for defamation." Judge Finch, with Rippey and Conway, JJ., concurring, registered a vigorous dissent contending that the present state of the law in New York afforded a cause of action, but that if the New York decisions were to be so interpreted as to deny relief, ". . . the matter should be called to the attention of the legislature."[7]

I

Whether redress should be granted to surviving relatives for villification of the dead is a debatable proposition. Cases and commentators have marshalled arguments in support of both the *pros* and *cons*. Since subjective opinions and considerations of public policy, rather than pure legal reasoning, underlie both of these viewpoints, only general reference will here be made to the authorities.[8] It is to be clearly noted, however, that in the

[1]Three American jurisdictions permit civil actions for libel of the dead: Illinois, ILL. ANN. STAT. (Smith-Hurd 1941) c. 126, §§ 4-5, Oklahoma, OKLA. STAT. ANN. (1938), Tit. 12, § 1441, and Texas, TEX. REV. CIV. STAT. (Vernon 1935) § 5430.

[2]Twenty-three states make defamation of a deceased a crime. See Armstrong, *Nothing But Good of the Dead?* (1932) 18 A. B. A. J. 5229 for a compilation of these statutes.

[3]DIG. 47, 10, 11, under heading: *De iniuriis.*

[4]Cass. 15 nov. 1900, Dallez 1901. 1. 137. So also Quebec grants a right of action to vindicate the memory of ancestors. Chiniquy v. Bégin, 42 Quebec Super. Ct. 261, 7 Dom. L. Rep. 65, *appealed* 24 Dom. L. Rep. 687 (1915).

[5]GERMAN CIVIL CODE (Loewy 1909) Act. 823.

[6]Rose v. Daily Mirror, Inc., 259 App. Div. 928, 20 N. Y. S. (2d) 315 (2d Dep't 1940).

[7]284 N. Y. 337, 31 N. E. (2d) 182 (1940).

[8]*Cf.* Armstrong, *Nothing But Good of the Dead? supra* note 2; Shepherd, *Libelling the Dead* (1932) 35 LAW NOTES 224 and cases cited therein; Walton. *Libel Upon the Dead and the Bath Club Case* (1927) 9 J. COMP. LEG. & INT. L. (3d Serv.) 1; *Defaming the Dead—and Vice Versa* (1937) 53 SCOT. L. REV. 145; *Defamation of the Dead* (1935) 89 JUST. P. 460; Note (1925) 59 I. L. J. 195.

instant decision the plaintiffs did not sue to recover for defamation of the memory of the deceased Jack Rose but rather proceeded upon the theory that the statements printed were libelous as to them *personally*. Whether Mr. Rose's relatives could or should as a matter of public policy collect damages for harm to them from what, admittedly, would have been a libel upon him if he were alive is, it seems, a collateral issue, for the suit of the plaintiffs is not derivative. The plaintiffs claim injury to their own standing in the community, flowing from false reports concerning a third person; and whether that third person is or is not living is seemingly irrelevant if the alleged libellants can prove damage to themselves and advance a reasonably supportable theory upon which recovery can be awarded.

In the principal case, the plaintiffs were explicitly mentioned in the newspaper article as the surviving wife and children respectively. There is no real question of their identification. The defendant admits that the statements were libelous so far as they would have affected Mr. Rose were he living. The majority, however, seizes upon the fact that, since the plaintiffs were only incidentally referred to, no *direct* reflection was made upon them, and, therefore, no recovery is to be permitted.

It is difficult to perceive why the reflection is not direct. Had the plaintiffs been totally unassociated with the deceased, then any defamation of Mr. Rose could hardly be said to be detrimental to the plaintiffs. But the courts have long realized that where certain defined relationships exist between two persons, libel or slander of the one may easily assume a damaging character with reference to the other.[9] The court speaks of other jurisdictions which have granted relief in analogous relational cases.[10] Professor Green classifies these relationships as ". . . family, social, political, professional, and trade," maintaining that they are virtually property interests and that an impairment of the interest itself may affect persons other than the immediate target.[11] Thus a husband has recovered for injury to the husband-wife relationship *via* defamation of the wife. True, the court was of the opinion that the *sine qua non* of his recovery was the right of the wife herself to collect damages.[12] But since it is the philosophy of a progressive legal system to offer a remedy whenever a substantial social interest is interfered with, it would appear inequitable to deny a cause of action to the living *A* for harm suffered by him simply because the policy of precedent has seen fit to refuse similar relief to the survivors of the deceased *B* for an attack upon *B's* reputation on the controversial theory that the dead "have no rights and can suffer no wrong."[13] Other decisions illustrate that a partnership may

[9]It has been held to be a libel also to write of a person that a near relative of his was a criminal. Merrill v. Post Pub. Co., 197 Mass. 185, 83 N. E. 419 (1908). Likewise, a plaintiff has been granted recovery where her picture was printed in a newspaper with the caption underneath explaining that she was attempting to rescue her convicted father from capital punishment. Van Wiginton v. Pulitzer Pub. Co., 218 Fed. 795 (C. C. A. 8th 1914). See the cases collected in Burton v. Cromwell Pub. Co., 82 F. (2d) 154, 155 (C. C. A. 2d 1936).

[10]Rose v. Daily Mirror, Inc., *supra* note 7, at 337.

[11]Green, *The Right of Privacy* (1933) 27 ILL. L. REV. 237.

[12]Garrison v. Sun Printing and Publishing Ass'n., 207 N. Y. 1, 100 N. E. 430 (1912).

[13]Reg. v. Ensor (1887) 3 T. L. R. 366.

recover for defamatory statements directed at one of the partners,[14] a corporation for libel of one of its officials,[15] a master for defamation of his servant, the business being adversely affected thereby.[16] The basis of redress in these latter instances, furthermore, does not depend on the right of the one immediately damaged to obtain indemnity, for the plaintiffs have been granted independent recovery for injury to themselves or itself. Clearly, in the principal case, the plaintiffs were in such peculiar, immediate relation with the libellant that any injury to the latter meant a natural resultant harm to the former since all shared alike in the "property interest" which the relationship represented. Naturally, the relationship must be close and immediate, for, otherwise, innumerable collateral relatives would crowd the courtrooms with their remote claims of injury; and the objection of multiplicity of suits and endless litigation would then assume rightful significance.[17]

Though the court in the instant case may have been unwilling radically to alter New York decisions in this field, it is suggested that an injustice might have been avoided by permitting the plaintiffs (had they asked leave to do so) to amend their complaints and to prove, if possible, special damages as in the case of a libel *per quod* or "innuendo". This would avert the possibility of spurious suits where the defamation is secondary in nature, but at the same time afford meritorious claims proper hearing and treatment.

The suggestion of the minority, speaking through Judge Finch, that the legislature should act on this point is well taken. In New York in recent years, the trend in analogous actions has been to afford relief where the common law had previously denied it. Thus, through statute the right of privacy has been recognized to a certain degree as a result of judicial recommendation by the court.[18] So also heirs have come to enjoy since 1935 a statute providing for the survival of tort actions, other than those coming within the Lord Campbell enactment, though the one immediately injured has not survived the action.[19] If the public policy underlying such legisla-

[14]Melcher v. Beeler, 48 Colo. 223, 110 Pac. 181 (1910); Note 52 A. L. R. 912 (1928).

[15]It is not necessary even that the allegedly libelous statements defame the official personally, so long as they directly reflect on the corporation's soundness or business methods. Martin County Bank v. Day, 73 Minn. 195, 75 N. W. 1115 (1898); Mutual Reserve Fund Life Ass'n. v. Spectator Co., 50 Jones & S. 460 (N. Y. Sup. Ct. 1884).

[16]Morgan v. Republican Pub. Co., 249 Mass. 338, 144 N. E. 221 (1924).

[17]*Cf. infra* notes 24 and 26.

[18]In *Roberson v. Rochester Folding Box Co., 171 N. Y. 538, 64 N. E. 442 (1902)*, the Court of Appeals refused to recognize the "right of privacy" in a case where the plaintiff's photograph was used in an advertisement without her consent. The court said that it was reluctant to interfere with settled principles, but it hinted at the advisability of legislative action. The result was the New York Civil Rights Law § 51, granting a cause of action for unauthorized advertising use of a person's name, portrait, or picture.

Experience has proved that in such instances, where the common law is modified to adjust it to modern conditions, legislative enactment is, for two reasons, more satisfactory than extensions by the court: (1) the statute, unlike a decision, is not retroactive; (2) statutes which change the common law are always strictly construed. So in the principal case, a comment of the *Roberson* case might well be repeated: "The legislative body could very well interfere. . . . In such event no embarrassment would result to the general body of the law for the rule would be applied only to cases provided for by the statute." 171 N. Y. at 545.

[19]N. Y. DEC. EST. LAW, Art. 4, § 119 recites: "No cause of action for injury to person

tion is to prevent depletion of the family estate, it would appear that to permit a cause of action in the principal case would aid in the general fulfillment of that public policy and recognize what the cases have long acknowledged, *i.e.*, that a family status and relationship can be impaired and depleted in ways other than purely pecuniary ones.[20]

II

Earnest consideration of the problem in the instant decision will demonstrate that in many libel and slander cases similar to the principal one the plaintiff is entitled to recovery on the ground of emotional disturbance as well as on the basis of defamation. The last few decades have witnessed the emergence of what the commentators have since labeled "a new tort": mental suffering. Much has been written on the subject.[21] While any appraisal of the writers' views, however brief, is precluded because of the limitations of space, it is significant to note that their unanimous opinion, along with that of the American Law Institute, favors redress for injuries resulting from internal operation of fright and shock caused by the wrongful conduct of another, though ancillary to no self-evident physical harm. A relatively small number of jurisdictions, including New York, continues to refuse to recognize mental shock standing alone and permits it to be pleaded only to support an award for special damages where the main cause for complaint is an actual physical injury. In 1936, the New York Law Revision Commission submitted a recommendation to the legislature which, if enacted would have permitted recovery for fright and shock without proof of accompanying bodily damage.[22] The bill was not reported out of committee in the Assembly and was tabled in the Senate, and has since then made no further progress.

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or property shall be lost because of the death of the person in whose favor the cause of action existed. . . ." The action is brought by the executor or administrator in behalf of the estate. Prior to the effective date of the statute (Sept. 1, 1935), death barred all subsequent actions. N. Y. DEC. EST. LAW, Art. 5, § 130 is the New York Lord Campbell enactment and provides for an action by the executor or administrator where the defendant's alleged wrongful act caused the death of the deceased.

In *Walker v. Robertson, 2 Murray's Jury Trial Rep. 508 (1821)*, the son, as representative, was permitted not only to continue a libel action originally brought by his father who predeceased the conclusion of the suit but also to bring a second action in his own right for *his* injuries, resulting from the libel upon his deceased parent.

[20]See the leading Scotch case, *Brown v. Ritchie, 6 Fraser 942 (1904)*, in which recovery by the surviving relatives was denied, but the majority qualified their position by granting that under certain circumstances the survivors might collect damages, namely "if the aspersion of the deceased *injured status* or caused pecuniary loss to the living." (Italics added).

In the same opinion, Lord Young dissented, maintaining: "I am of the opinion that the widow and children of a dead man whose character has been defamed are not only interested to clear the character of the deceased but it is their duty to clear the character and to seek *solatium* for the injury done to their own feelings."

See also, Ott v. Murphy, 160 Iowa 730, 141 N. W. 463 (1913); Wright, *Tort Responsibility for Destruction of Goodwill* (1929) 14 CORNELL L. Q. 298, 301.

[21]The best collection of citations to leading articles, notes and authorities will be found in N. Y. Leg. Doc. (1936) No. 65 (E) p. 74-5, n. 259. *Cf.* RESTATEMENT, TORTS (1934) § 436.

[22]*Act, Recommendation and Study Relating to Liability for Injuries Resulting from Fright or Shock*, N. Y. Leg. Doc. (1936) No. 65 (E).

Like all other minority states,[23] however, New York has through numerous exceptions whittled away a substantial portion of the rigid stand taken by the Court of Appeals in *Mitchell v. The Rochester Ry.*[24] The instant decision would seem to fall within one of these exceptions as enumerated by the court in *Garrison v. Sun Printing and Publishing Ass'n.*, where Chief Judge Hiscock stated:[25] "I think the rule of the cases referred to [the *Mitchell* case and those following it] is not here applicable. . . . [I]t might be said that substantial physical sufferings resulting from mere mental actions are not a natural result of negligent conduct which generally makes itself felt by inflicting some actual and direct physical injury. In the case of such a wrong as that of libel and slander, however, the natural and immediate effect in the line of results we are now discussing must be on the mind and not on the body, and therefore such mental disturbance and its consequences even in the shape of resulting sickness are fairly to be apprehended."

Although the *Garrison* case itself involves deliberate injury, the opinion clearly intimates that the court's reasoning applies both to willful and negligent defamation. It would seem that in the principal case any doubt that may have existed in the court's mind as to the plaintiffs' recovery for negligently created mental disturbance should have been resolved in their favor, for the facts disclose that ". . . the slightest effort at verification would have shown the falsity of the story," thereby placing the defendant's conduct in the category of gross negligence or willful infliction of injury for which every jurisdiction in both America and England which has spoken on the point will grant recovery. Further, if the court required a showing of specific proof of injury within the field of medical science, it would remove all objections to relief even in the instance of negligently caused emotional suffering since only *bona fide* and meritorious claims could then survive.[26]

It has always been a fundamental concept in our system of law that freedom of the press and fair comment should remain unhampered and inviolate. But tabloid journalism has prompted both courts and legislatures to curtail

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[23]For detailed discussion of the eight major exceptions and the position taken by the various minority jurisdictions, *cf. id.* 49-74.

[24]151 N. Y. 107, 45 N. E. 354 (1896). The court in the *Mitchell* case listed four reasons for its denial of recovery: (1) since no recovery can be had for mere fright standing alone (occasioned by the negligence of another), no recovery can be had for a resulting physical injury flowing from fright so caused; (2) injuries sustained through fright caused by another's negligence cannot be considered the proximate cause of such conduct; (3) the damages claimed are speculative; (4) a contrary rule would result in the successful prosecution of fraudulent claims.

[25]207 N. Y. 1, 2, 100 N. E. 430 (1912).

[26]If the court were convinced that medical science permits the proof of the physical harm as a consequence of mental suffering, it would in all probability modify its position as stated in the *Mitchell* case (*cf.* point 1, note 24 *supra*). But it should be here pointed out that in order for the court to grant recovery in the principal case, it would necessarily have to go even further than merely permitting recovery for fright and shock injuries. For in the principal case there was no immediate emotional disturbance but rather gradual and prolonged mental irritation from which physical injuries might easily result. To grant damages to the present plaintiffs would, therefore, be a very great advance over the *Mitchell* case. The *Restatement of Torts* Section 436 is in accord with holding the actor liable not only for immediate fright and shock but for other emotional disturbances as well.

somewhat the freedom of newspapers in order to protect both the rights and the privacies of the general public. It is submitted that a restriction in the nature of granting a right of action to the surviving immediate relatives for libel of a deceased person, upon either of the two theories above suggested, is not unwarranted in view of the tremendous and expanding circulation and influence of the daily press. The existence of that right would promote more careful reporting of news as well as afford relief where the shortcomings of the common law fail to supply it.

Louis Pollack

Securities Act of 1933: Effect of failure to register securities upon validity of contract to purchase.—Is an option to purchase securities unregistered with the SEC illegal and void as contrary to public policy? The question was answered in the negative by Mr. Justice McReynolds in *A. C. Frost & Co. v. Coeur d'Alene Mines Corp., 61 Sup. Ct. 414, 85 L. ed. 383 (1941).* Petitioner was the assignee of an option for the purchase of all or any part of 1,300,000 unregistered treasury shares of the defendant mines corporation. After petitioner had purchased 165,000 shares defendant repudiated the option and refused further delivery. Petitioner sued for damages.[1] The Supreme Court of Idaho, finding that "all the stock offered for sale amounted to public offerings" and that means of interstate communication and transportation were used, held that failure to register rendered the contract illegal and void as contrary to public policy.[2] On appeal the United States Supreme Court, for the purposes of the decision, accepted the Idaho court's finding that the evidence was sufficient to show a public offering, but held that the contract, otherwise legal and fair on its face, was not unenforceable.

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[1]The claim for damages included those consequent upon breach of the agreement, and for $16,306 which defendant had credited to petitioner under the terms of the contract. The option contract, as modified in 1935, authorized defendant to sell the optioned stock and upon sale to credit petitioner with the proceeds above the option price, *i.e.*, ten cents a share. Defendant had sold many shares at prices above ten cents and had given petitioner credits amounting to $16,306.

[2]A. C. Frost & Co. v. Coeur d'Alene Mines Corp., 61 Idaho 21, 98 P. (2d) 965 (1939). The court denied all recovery, although the trial court had given judgment for the $16,306 (see note 1). The United States Supreme Court reversed on both items, 61 Sup. Ct. 414, 85 L. Ed. 383 (1941). On the point of illegality the Idaho court said, by Budge, J.: "The proof rather than sustaining the burden of showing that the transaction was exempted affirmatively shows that all the stock offered for sale amounted to public offerings and that interstate means of communication and transportation were used in connection therewith. Certainly the facts disclosed by the option agreement itself and the so-called subsequent modification, etc., and the many letters passing between Frost & Company and Coeur d'Alene Mines Company, recognizing that Frost & Company was selling the treasury stock to all and sundry, directing delivery of such treasury stock to other stock firms or brokers for sale to or by them flatly refutes such contention. . . . It should be borne in mind that the option agreement is void because prohibited by law. The well established rule is that if the contract is void because prohibited by law or as against public policy the courts will leave the parties in the identical situation in which it finds them, and the contract cannot be treated as valid by invoking estoppel." 61 Idaho 21, 25, 27, 98 P. (2d) 965 (1939).

The Securities Act of 1933 requires the registration of securities to be sold to the public, granting certain exemptions based on the type[3] of securities and the size of the offering.[4] The purpose of the legislation is the protection of innocent purchasers, and the Act sets forth a standard of conduct in the issuance and sale of securities, and also minima for disclosure to the public. For failure to register with the SEC the Act imposes sanctions and raises certain liabilities to purchasers of the securities. Section 5[5] makes it unlawful to make use of the mails or any means of interstate transportation or communication to effect the delivery or sale of an unregistered security or the transmittal of an inadequate prospectus.[6] Section 12[7] authorizes recovery of the consideration paid where the securities are sold in violation of section 5 or, in effect, of section 11.[8] A fine of not more than $5000 or imprisonment of not more than five years is the penalty imposed by section 24[9] for willful violation of any of the provisions of the Act. Despite the use of the term "unlawful" in section 5 and the imposition of fine or imprisonment, the Court stresses the purpose of the Act—the protection of purchasers[10]—and holds that the illegality which raises liabilities to purchasers and even merits criminal penalties is not a defense to an action by one who will not be injured by the enforcement of the contract, where such enforcement would not be damaging to the public.

The general proposition that contracts in contravention of public policy will not be enforced is too well settled to require citation of authority. The Court in the *Frost* case points out, however, that the doctrine should be applied only in cases plainly within the reasons upon which it rests. After examination of the issues, and with the aid of a memorandum filed by the SEC,[11] the Court concludes that voiding the option contract here would thwart rather than aid the purpose of the legislation. The Securities Act

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[3]Securities Act of 1933, § 3(a), 48 STAT. 75 (1933), amended 48 STAT. 906 (1934), 15 U. S. C. § 77c(a) (Supp. 1940).

[4]Securities Act of 1933, § 3(b), 48 STAT. 76 (1933), 15 U. S. C. § 77c(b) (Supp. 1940). For comment on the recent broadening of the exemption for issues not exceeding $100,000 see Note (1941) 26 CORNELL L. Q. 343.

[5]48 STAT. 77 (1933), amended 48 STAT. 906 (1934), 15 U. S. C. § 77e (Supp. 1940). § 4(1) 48 STAT. 77 (1933), amended 48 STAT. 906 (1934), 15 U. S. C. § 77d (1) (Supp. 1940) provides that the provisions of § 5 shall not apply to ". . . transactions by an issuer not involving any public offerings; . . ."

[6]The requirements for the prospectus are set forth in § 10, 48 STAT. 81 (1933), amended 48 STAT. 906 (1934) 15 U. S. C. § 77j (Supp. 1940).

[7]48 STAT. 84 (1933), 15 U. S. C. § 77l (Supp. 1940).

[8]§ 11 authorizes recovery from signers of the registration statement, directors, accountants, underwriters, and other specified persons in case there has been an untrue statement of a material fact or the omission of a material fact. 48 STAT. 82 (1933), amended 48 STAT. 907 (1934), 15 U. S. C. § 77k (Supp. 1940).

[9]48 STAT. 87 (1933), 15 U. S. C. § 77x (Supp. 1940).

[10]That for the purpose of deciding whether or not a civil cause of action under § 11 is assignable a court may call the civil remedy "penal" in nature rather than "remedial" is to be carefully distinguished from the fact that the Act contains penal provisions for the willful violation of any of the sections of the Act. See Note (1941) 26 CORNELL L. Q. 488, commenting on *Wogahn v. Stevens, 236 Wis. 122, 294 N. W. 503 (1940)*, which held that the civil remedy under § 11 is penal rather than remedial.

[11]A. C. Frost & Co. v. Coeur d'Alene Mines Corp., 61 Sup. Ct. 414, 417, n. 2, 85 L. ed. 383 (1941).

went further than merely proscribing certain activities; the legislative purpose was the protection of purchasers. "They are given definite remedies inconsistent with the idea that every contract having relation to sales of unregistered shares is absolutely void; and to accept the conclusion reached by the [Idaho] Supreme Court below would probably seriously hinder rather than aid the purpose of the statute."[12] The Act contains no provision declaring that contracts in contemplation of a public offering of unregistered securities are void. The Court expresses its willingness to add a sanction to those set forth by a statute, where this would further the purpose of the statute; but where the contrary appears, and the statute is explicit in its remedial provisions, the Court will make no additions.

The SEC memorandum points out further that the rule of the Idaho court is so broad that it would upset the statutory system of relief and frustrate in many ways the purposes of the Act. Such rule, for instance, would prevent an issuing corporation from recovering from an underwriter and thus putting to use in its business the money invested by the public. "[I]t would be anomalous to rest such an injury to the investors upon the fact that the transaction in which the securities were distributed violated the Act, which was designed to protect those investors."[13] A court cannot find its answer merely in whether or not certain acts have violated the securities legislation. In each situation it must decide the issue: would enforcement of the obligation effectuate or frustrate the purposes of the Act? It is not entirely clear that the parties in the instant case had entered upon a course of action violative of the Act, inasmuch as the Court did not pass on the question of whether there was in fact a public offering. Even assuming, as the Court did for the purposes of the case, that there was such an offering and hence a violation of the Act,[14] the decision of the Court seems unimpeachable in enforcing the contract liability.

Harry Scott, Jr.

Wills: Legacy to attesting witness: Saving of legacy by flight from the state.—Section 27 of the Decedent Estate Law of New York provides that "if any person shall be a subscribing witness to the execution of any will, wherein any beneficial devise, legacy, interest or appointment of any real or personal estate shall be made to such witness, *and such will cannot be proved without the testimony of such witness,* the said devise, legacy, interest or appointment shall be void, so far only as concerns such witness, or any, claiming under him; and such person shall be a competent witness, and *compellable to testify* respecting the execution of the said will, in like manner as if no such devise or bequest has been made."[1]

Section 27 was intended to soften the rigors of the common law that voided

[12]McReynolds, J., *id.* at 417 and 386.
[13]SEC memorandum, *id.* at 417, n. 2, and 386, n. 2.
[14]*Supra* note 5 and connected text.

[1]Italics added.

a will if a necessary witness had any beneficial interest therein.[2] At the same time some measure of protection against fraud and undue influence was retained by invalidating any testamentary gift to an attesting witness without whose testimony the will could not be proved.

A recent decision of the Court of Appeals has demonstrated strikingly the limitations of Section 27. The testatrix, by a will in her own handwriting, bequeathed "the business of Edgar B. Walters organization to the help now running same. . . ." The two attesting witnesses, *A* and *B*, were residents of New York and were among the five persons whom the testatrix intended should take under this clause. *A* testified at the probate proceedings and, in accordance with Section 27, lost his legacy. *B* went to Connecticut for the express purpose of avoiding testifying, and remained there until after the will was probated. The will was probated without the testimony of *B*, pursuant to an order of the Surrogate dispensing with the testimony of *B*.[3] No person sought an order to compel *B* to give testimony to be taken out of the state by commission.[4] At the time of distribution *B* came back to New York and demanded her legacy. *Held: B* was entitled to take her legacy. In re *Walters Estate, 285 N. Y. 158, 33 N. E. (2d) 72 (1941)*,[5] reversing a decree of the Surrogate's Court[6] which had been affirmed by the Appellate Division.[7]

The Surrogate was confronted with the anomalous position of penalizing *A* for having dutifully testified at the probate proceedings and of rewarding *B* for having evaded the same duty. "The situation is far from appealing to

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[2]ATKINSON, WILLS (1932) § 121. "It was the common law in England that where a legatee or devisee named in a will became a subscribing witness to it and it could not be probated without his testimony, the will was void. Many wills were drawn by laymen unfamiliar with this principle and cases frequently arose where great hardship was worked and the wishes of the deceased were entirely frustrated by the fact that a devisee or legatee named therein had acted as a subscribing witness to the will and it could not be probated without his testimony. To remedy the evils and hardships growing out of that situation a statute was enacted which deprived the witness of his interest as legatee or devisee under such will, and thereby made him a competent witness. (25 GEO. II, ch. 6; 2 BLACK. COM. 377; 4 KENT. COM. (4th ed.) 308; FOWLER'S DECEDENT ESTATE LAW, ANN. 223). A statute to the same effect was enacted in this state, and was held to be peremptory, and made a devise to a witness to a will void. (Jackson v. Denniston, 4 Johns 311)." Matter of Dwyer, 192 App. Div. 72, 76, 182 N. Y. Supp. 64, 66 (4th Dep't 1920).

[3]Section 142 of the Surrogate's Court Act provides that in case of death or absence from the state, the testimony of a subscribing witness can be dispensed with and the will can be probated upon the testimony of a single witness.,

[4]Section 142 of the Surrogate's Court Act, *supra* note 3, further provides that "where such witness is absent from the State and it is shown that testimony can be obtained with reasonable diligence, the Surrogate may, in his discretion, and shall upon the demand of any party, require his testimony to be taken by commission."

[5]See Note, *"Effect of Attesting Witnesses' Interest Under Legacy Purging Statutes"* (1941) 50 YALE L. J. 701, disapproving the result reached by the lower courts in the principal case. A note in (1940) 53 HARV. L. REV. 858 reaches an opposite conclusion: "The decision can in any case be justified on the ground that it is against public policy to permit a witness intentionally to avoid his duty to testify at the probate of a will."

[6]172 Misc. 207, 15 N. Y. S. (2d) 8 (Surr. Ct. 1939).

[7]*Aff'd w. o. op.*, 259 App. Div. 1078, 21 N. Y. S. (2d) 37 (2d Dep't 1940). There is a dissent, however, by Justice Taylor in which he stresses the penal character of Section 27 and the necessity for its strict construction.

equity and to the conscience of this court."[8] The Surrogate, holding that Section 27 could not be so easily circumvented, voided the legacy to *B*.

The Court of Appeals, one judge dissenting,[9] took the simple and satisfactory position that the will had in fact been proven without the testimony of *B*, and that, since Section 27 voided a gift to an attesting witness only when "such will cannot be proved without the testimony of such witness", the section obviously did not apply. Discounting the argument of public policy that had so swayed the Surrogate, Chief Judge Lehman remarked, "We apply the law as it is written."[10]

Although the decision in the principal case cannot be criticized in view of the language of Section 27 and the meagre precedents available,[11] it does seem, at first glance, to open the door to a wholesale evasion of Section 27 by witnesses who are beneficially interested in the wills they have attested. However, the Court of Appeals aptly pointed out that no person had sought to take the testimony of *B* in Connecticut by commission. Upon an affidavit by the proponent that he could not locate *B*, the Surrogate had issued an order dispensing with the testimony of *B*. Upon his own initiative, the Surrogate could have ordered the testimony of *B* to be taken by commission in Connecticut, and the Surrogate was required to do so if requested by an interested party. Had *B* remained obdurate, the penal sanctions of the Connecti-

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[8]172 Misc. 213, 15 N. Y. S. (2d) 15 (Surr. Ct. 1939).

[9]Judge Desmond dissented on the ground that the legacy was void when made, since *A* and *B* were then within the state, and it could not thereafter be validated by the act of *B* in leaving the State. "To allow her [*B*] to collect her legacy would destroy the effectiveness of Section 27 of the Decedent Estate Law and would point out a very simple and easy means to produce the very result prohibited by the statute, the payment of a legacy to one of two subscribing witnesses whose testimony is necessary to prove a will."

[10]258 N. Y. 162, 33 N. E. (2d) 74 (1941).

[11]In *Cornwell v. Wooley, 3 Keyes 378, 1 Abb. App. Dec. 441 (1867)*, it was held that where a subscribing witness was a non-resident of the state and the will could be proved upon the testimony of the other subscribing witness, a legacy to the non-resident witness was valid.

It has been held that where there are three witnesses, the witness did not forfeit his legacy, even though he did testify at probate, since there was the requisite number of impartial witnesses to prove the will. Matter of Owen, 48 App. Div. 507, 62 N. Y. Supp. 919 (2d Dep't 1900), *affirming* 26 Misc. 179, 56 N. Y. Supp. 853 (Surr. Ct. 1898). In the *Owen* case the court stated that "the test established by the statute [Sec. 27] is the provableness of the will without the testimony of a subscribing witness to whom a legacy or devise is given. I cannot see that it matters in the least what the reason is why the will happens to be provable without his testimony."

In *Caw v. Robertson, 5 N. Y. 125 (1851)*, it was held that where a will is witnessed by more than the requisite number of witnesses, all of whom are legatees under the will, the last subscribing witness does not lose his legacy.

"It follows that if the language of Sec. 27—'cannot be proved without the testimony of such witness'—is to be accepted as referring to the theory of *proving* wills, a gift to one of the attesting witnesses is invalidated in no case, for the will can be proved without his testimony *even where he has absented himself from the state* or where he has appeared and testified against the instrument. The conclusion seems to be that Sec. 27 must be taken to refer to what actually has occurred, and that the validity of the gift to the attesting witness depends upon whether he has in fact testified and also upon the relation of his testimony to the proof of the will." DAVID, NEW YORK LAW OF WILLS (1924) § 588. (Italics added).

cut law[12] could have been invoked against her. If the facts of the case warranted this prescribed procedure,[13] it could have been employed without straining the interpretation of Section 27 by declaring a forfeiture of the legacy.

Ralph H. German

Wills: Revocation clause: Quantum of evidence to prove lost will as a revoking instrument.—The will, duly executed in 1930, of John F. Reed, was filed for probate. The probate was contested on the allegation that Reed had executed a will in 1936, expressly revoking all prior wills. Reed had had custody of the 1936 will, which could not be found. There was testimony that he had intended to burn it. The lower court denied probate to the 1930 will, which made specific bequests to all the testator's children, because it had been revoked and annulled by the will of 1936.

Neither of the two attesting witnesses who testified to the fact of execution of the 1936 will had read it, and neither knew anything concerning its contents. A son of the testator and his wife testified that they had read the will and that it contained a revocatory clause. There was testimony to the effect that the 1936 will devised three lots acquired subsequent to the execution of the 1930 will. Two witnesses testified that the testator had told them that the 1936 will "fixed" things so that all the children would take equally. No further evidence concerning the dispositive provisions of the instrument was adduced. The contestants contended that all they need show was that a subsequent will had been executed which contained a clause annulling former wills. In *Reed v. Johnson, 143 S. W. (2d) 32 (Ark. 1940)*, the Arkansas Supreme Court, reversing the lower court, held that the burden was clearly on the contestants to introduce evidence which clearly, positively and satisfactorily established the entire contents of the will, or all the material parts thereof, and that it was not sufficient to show that a subsequent will had been executed in 1936 containing a revocatory clause, ordering the lower court to admit the will of 1930 to probate.

The conclusion reached by the Arkansas court is supported by the dictum of a single Pennsylvania case.[1] The problem presented arises from the statutory safeguards placed about the execution, revocation, and proving of wills. Whether the revocation of a will which itself expressly revoked a former will "revives" the prior will is an old legal problem.[2] New York

[12]Section 5589 of the General Statutes of Conn. (Rev. 1930) provides for commitment if a witness refuses to give testimony by deposition needed in a judicial proceeding in another state.

[13]*Supra,* note 4. The section provides, however, that it must be shown that the testimony of the out-of-state witness is available "with reasonable diligence", and it could be contended that no such showing was made in the principal case.

[1]*Re* Harrison, 316 Pa. 15, 173 Atl. 407, 94 A. L. R. 1019, 1024 (1934). See Rudy v. Ulrich, 69 Pa. 177, 8 Am. Rep. 238 (1871) *semble;* Bates v. Hacking, 29 R. I. 1, 68 Atl. 624 (1908).

[2]Williams v. Miles, 68 Neb. 463, 94 N. W. 705 (1903); Ferrier, *Revival of a Revoked Will* (1940) 28 CALIF. L. REV. 265; Evans, *Testamentary Revival* (1927) 16 KY. L. J.

settled that question when, in 1830, it adopted an "anti-revival" statute, now embodied in Section 41 of the Decedent Estate Law.[3] This statute has been adopted in nearly half of the states, including Arkansas.[4] According to the report of the New York Revisors,

> "The whole statute proceeds on the principle that the hazard, that in some cases the real intention of the deceased may be violated, and his bounty be intercepted from the persons he designated to share it, is not to be compared with the danger, that the claims of those whom the law would entitle to his estate, may be defeated by fraud and perjury, if any other than the most certain and solemn evidence of intention be permitted to be introduced. In this country especially, we should not hesitate to carry the principles of the statute to its full extent. We may safely lean in favor of intestacy; since it rarely happens that the dispositions of a disputed will are as just and equitable as those which, in the event of its being set aside, the law provides."[5]

Under this statute the question of revival seems definitely settled. By the consistent holdings of courts applying the statute, where the execution of a will specifically revoking a prior will is proved, the prior will is denied probate.[6] The Arkansas court, by ordering the probate of the 1930 will after sufficient proof of the execution of such a subsequent will had been adduced, seems to have completely disregarded this statute.[7]

The court reached its conclusion by applying the standard of proof required by the procedural statute providing for probate of lost wills. That statute provides that no will shall be proved as a lost or destroyed will *"unless its contents be clearly and distinctly proved. . . ."*[8] The court cited three

47; Roberts, *The Revival of a Prior by the Revocation of a Later Will* (1900) 48 AM. L. REG. (N.S.) 505. For a concise statement of the conflict between the common law and the ecclesiastical rules, see Rudisell v. Rodes, 70 Va. 147, 149 (1877); REPORT OF REVISORS OF N. Y. STATUTES OF 1827-1828, pt. II, c. IV, in 3 N. Y. REV. STAT. (2d ed. 1836) Appen. 633-634.

[3]"If, after making any will, the testator shall duly make and execute a second will, cancellation or revocation of such second will shall not revive the first will, unless it appear by the terms of such revocation that it was his intention to revive and give effect to his first will, or unless after such destruction, cancelling or revocation he shall duly republish his first will."

[4]Bordwell, *Statute Law of Wills* (1929) 14 IOWA L. REV. 283, 309.

[5]REPORT OF REVISORS, *loc. cit. supra* note 2.

[6]*Matter of* Wylie, 162 App. Div. 574, 145 N. Y. Supp. 133 (3d Dep't 1914); *Matter of* Wear, 131 App. Div. 875, 116 N. Y. Supp. 304 (2d Dep't 1909); *Matter of* Barnes, 70 App. Div. 523, 75 N. Y. Supp. 373 (4th Dep't 1902); *In re* Fogarty's Estate, 155 Misc. 727, 281 N. Y. Supp. 577 (Surr. Ct. 1935); *In re* Wissman's Estate, 135 Misc. 35, 237 N. Y. Supp. 535 (Surr. Ct. 1929); *Matter of* Williams, 121 Misc. 243, 201 N. Y. Supp. 205 (Surr. Ct. 1923); *In re* Forbes' Estate, 1 Pow. 590, 24 N. Y. Supp. 841 (Surr. Ct. 1893). For collection of additional cases, see Notes (1924) 28 A. L. R. 911, 921-3; (1928) 53 A. L. R. 521.

[7]No mention of the anti-revival statute is contained in the opinion, nor is there any reference to its applicability.

[8]ARK. DIG. STAT. (Pope, 1937) § 14563. N. Y. SURR. CT. ACT § 143, and N. Y. DEC. EST. LAW § 204, provide for the same measure of proof. The statute is general. See 9 WIGMORE, EVIDENCE (3d ed. 1940) § 2498; 1 PAGE, WILLS (2d ed. 1926) § 790; Bordwell, *supra* note 4, at 290 *et seq.*

Arkansas cases in which this rule of evidence was applied, ignoring the fact that in all these cases the contestants offering proof of the lost will sought to take under its dispositive provisions.[9] In the instant case no such question was in issue. Therefore proof of the dispositive provisions would seem irrelevant. If the second will had been revoked, or destroyed *animus revocandi*, the statute regarding the probate of lost wills would apply in any event only to proof of the revocation clause, since the substantive provisions of the will could not be admitted to probate.[10] Yet, though not admissible, or provable as a lost will, such an instrument would clearly operate as a revocation of the prior will under the anti-revival statute.[11]

The statute prescribing the method by which a will may be revoked also bears on the question of evidence here involved. That statute provides that "no will in writing . . . shall be revoked or altered otherwise than by some other will in writing *or some other writing* of the testator, declaring such revocation or alteration, and executed with the same formalities with which the will itself was required by law to be executed. . . ."[12] An instrument duly executed as a will, but inoperative as such from other circumstances (as lack of proof of dispositive provisions), expressly revoking prior wills, would seem to be "some other writing" within the meaning of this statute and it has been so held.[13] The insertion of an express revocatory clause in a duly executed instrument is held to be not only an expression of a purpose to revoke the prior will but also an actual consummation of that purpose, and the revocation is effective when the instrument is executed with the prescribed formalities.[14] The Arkansas court admitted that the execution of a subsequent will containing an express revocatory clause was proved by sufficient evidence, and yet refused to give effect to the revocation thereby

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[9]Allnutt v. Wood, 176 Ark. 537, 3 S. W. (2d) 298 (1928); Rawlins v. Berry, 128 Ark. 273, 194 S. W. 249 (1917); Nunn v. Lynch, 73 Ark. 20, 83 S. W. 249. The rule adduced from these cases by the court is based on the Maryland case of *Rhodes v. Vinson, 9 Gill & J. 169, 171, 52 Am. Dec. 685 (Md. 1850)*, and was there laid down as a rule of evidence applicable "where the object is to establish the contents of a paper which has been destroyed, *as and for a last will. . . .*" (Italics supplied.) The Maryland court thirteen years later considered, in *Colvin v. Warford, 20 Md. 357, 14 Am. Dec. 532 (1863)* a case like the Arkansas case herein noted, and lucidly distinguishing the *Rhodes* case, refused to require that degree of necessary proof.

[10]*In re* Fogarty's Estate, 155 Misc. 727, 281 N. Y. Supp. 577 (Surr. Ct. 1935) (revocation presumed from fact will left in testator's custody not produced); *In re* Ten Eyck's Estate, 155 Misc. 444, 279 N. Y. Supp. 437 (Surr. Ct. 1935).

[11]*In re* Lones, 108 Cal. 688, 41 Pac. 771 (1895); *Matter of* Kuntzl, 163 App. Div. 125, 148 N. Y. Supp. 382 (2d Dep't 1914); Collins v. Collins, 110 Ohio St. 105, 143 N. E. 561 (1924), 38 A. L. R. 230, 244 (1925).

[12]ARK. DIG. STAT. (Pope, 1937) § 14519. Similar statutes are to be found in 33 states. Bordwell, *loc. cit. supra* note 4. The provisions of the New York statute are identical with that of Arkansas. See N. Y. DEC. EST. LAW § 34.

[13]Barksdale v. Hopkins, 23 Ga. 332 (1857); *see* Colvin v. Warford, 20 Md. 357, 14 Am. Dec. 532 (1863); *but see* Rudy v. Ulrich, 69 Pa. 177, 8 Am. Rep. 238 (1871). The question is generally discussed by Evans, *supra* note 2, at 49; Note (1940) 28 KY. L. J. 227.

[14]Colvin v. Warford, 20 Md. 357, 14 Am. Dec. 532 (1863). But see *Allen v. Beemer, 372 Ill. 295, 23 N. E. (2d) 724 (1939)*, for the exceptional situation in which an express revocatory clause in a subsequent will did not revoke the prior will. The case is noted in (1940) 28 ILL B. J. 245, 247, and (1939) 5 JOHN MARSHALL L. Q. 312.

effected. The rule of evidence laid down by the court thereby nullified a second substantive statute.[15]

In this country it has been uniformly held, without a decision to the contrary prior to the Arkansas case, that when proof of the execution of a subsequent will and the presence therein of an express revocatory clause has been supported by sufficient evidence, such proof is sufficient to establish a revocation of a prior will.[16] Where litigants seek to establish a lost will to take under it, both by case law and by statute the contents must be proved by "clear and convincing proof".[17] But in such cases the propounders of the lost will are seeking to deprive the legal heirs of the benefit of the laws of intestacy. The policy of the courts and the legislatures in requiring a strict measure of proof here is based on the traditional English view that the devolution of property through intestacy is to be preferred over the doubtful claims under an alleged lost will which rests entirely in parol.[18] When the alleged lost will is offered for the purpose of establishing intestacy the policy of the court favors the propounder of the revocatory instrument, and a less strict measure and quantum of proof is required.

It is submitted that in *Reed v. Johnson* the Arkansas court laid down an unjustifiable rule of evidence, a rule that in many cases where the revoking will is not produced or provable at probate will nullify the anti-revival statute, and render nugatory the provisions of the statute prescribing the means and manner in which a will may be revoked, and a rule that will prove burdensome in future cases.

Stanley M. Brown

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[15]The court brushed aside the suggestion that this statute had any bearing on the question of evidence, saying, at page 35: "We do not find anything in that section relieving appellants from proving the contents of the subsequent will by clear, positive and satisfactory testimony in order to annul or revoke a former will."

[16]Estate of Johnson, 185 Cal. 763, 198 Pac. 795 (1922); Barksdale v. Hopkins, 23 Ga. 332 (1857); Colvin v. Warford, 20 Md. 357, 14 Am. Dec. 352 (1863); Giles v. Giles, 204 Mass. 383, 90 N. E. 595 (1910); Wallis v. Wallis, 114 Mass. 510 (1874); Dudley v. Gates, 124 Mich. 440, 83 N. W. 97 (1900), *aff'd on rehearing*, 124 Mich. 446, 86 N. W. 959 (1901); *Re* Cunningham, 38 Minn. 169, 36 N. W. 269 (1888); Vining v. Hall, 40 Miss. 83 (1866); Williams v. Miles, 68 Neb. 463, 94 N. W. 705 (1903), *rehearing denied*, 68 Neb. 479, 96 N. W. 151 (1903); Day v. Day, 3 N. J. Eq. 549 (1831); *Matter of* Wylie, 162 App. Div. 574, 145 N. Y. Supp. 133 (3d Dep't 1914); *Matter of* Barnes, 70 App. Div. 523, 75 N. Y. Supp. 373 (4th Dep't 1902); *In re* Stege's Estate, 161 Misc. 667, 293 N. Y. Supp. 857 (Surr. Ct. 1937); Cooley v. Cooley, 116 Misc. 157, 189 N. Y. Supp. 577 (Sup. Ct. 1921); Melhase v. Melhase, 87 Ore. 590, 171 Pac. 216 (1918); Brackenridge v. Roberts, 114 Tex. 418, 267 S. W. 244 (1924), *rev'g* 245 S. W. 786 (Tex. Civ. App. 1922), *rehearing denied*, 114 Tex. 435, 270 S. W. 1001 (1925); 1 PAGE, WILLS (2d ed. 1926) §§ 791, 632, 635; 1 UNDERHILL, WILLS (1900) § 278.

[17]9 WIGMORE, EVIDENCE (3d ed. 1940) § 2498; 7 *id.* § 2052.

[18]See 7 WIGMORE, EVIDENCE (3d ed. 1940) § 2106; REPORT OF REVISORS, *loc. cit. supra* note 2